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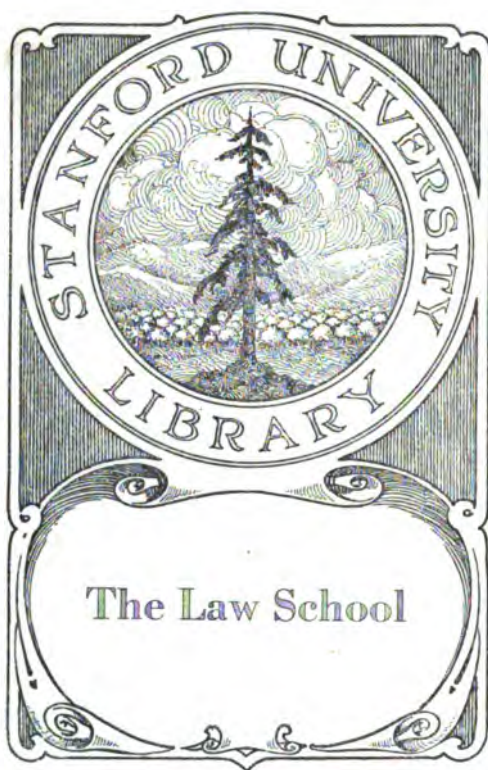
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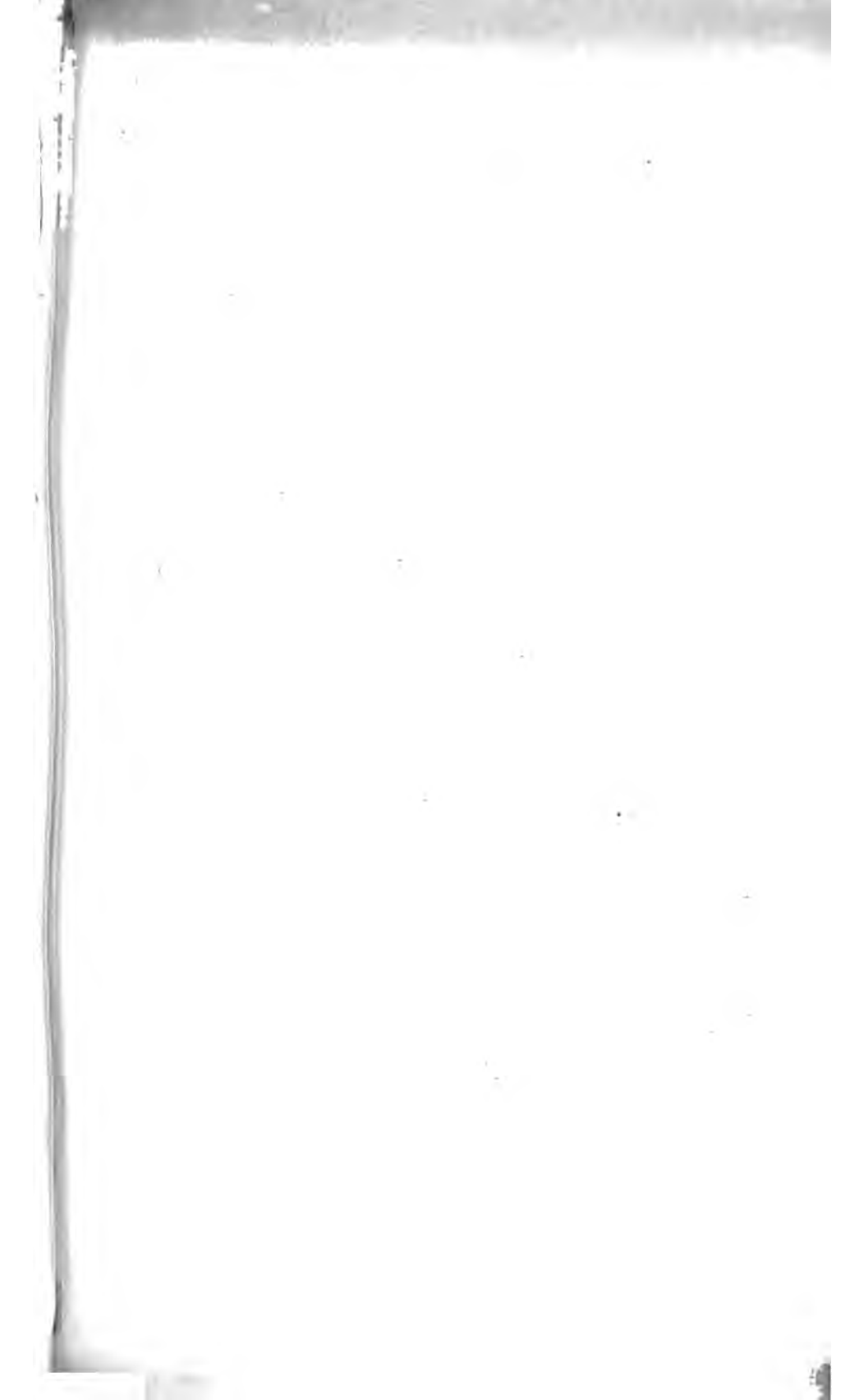
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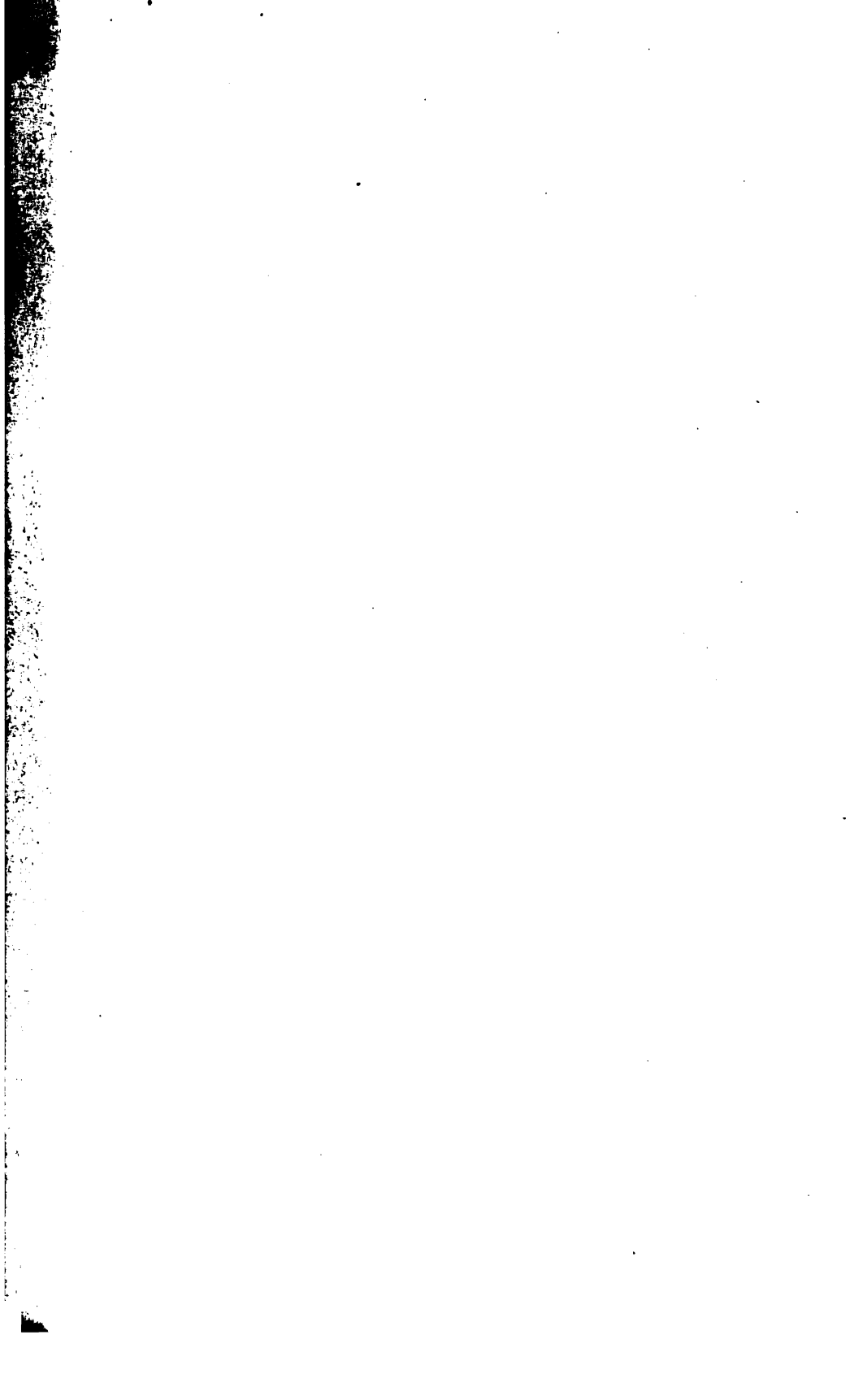
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REPORTS
OF
CASES DECIDED
BY THE
ENGLISH COURTS,
WITH
NOTES AND REFERENCES TO KINDRED CASES
AND AUTHORITIES.

BY
NATHANIEL C. MOAK,
Counsellor at Law.

VOLUME XXVI.

CONTAINING

9 CHANCERY DIVISION, pp. 159-705.
10 CHANCERY DIVISION, pp. 1-420.

WILLIAM GOULD & SON,

ALBANY, N. Y.:
WILLIAM GOULD & SON,
LAW PUBLISHERS AND BOOKSELLERS.
1881.

Entered according to Act of Congress in the year eighteen hundred and eighty-one,
By WILLIAM GOULD & SON,
in the office of the Librarian of Congress, at Washington.

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 Right Hon. LORD SELBORNE,² " 1880.

LORDS OF APPEAL IN ORDINARY.

Right Hon. LORD BLACKBURN, appointed 1876.
 Right Hon. LORD GORDON,³ " "
 Right Hon. WILLIAM WATSON,⁴ " 1880.

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Right Hon. Sir MONTAGUE E. SMITH.	
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 The Right Hon. the MASTER OF THE ROLLS.
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 Right Hon. Sir RICHARD PAUL AMPHLETT,⁶ " "
 Right Hon. Sir HENRY COTTON,⁷ " 1877.
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 Hon. Sir JAMES BACON, " " 1870.
 Hon. Sir CHARLES HALL, " " 1873.
 Hon. Sir EDWARD FRY,⁹ Justice of the High Court, " 1877.

¹ Retired with Earl of Beaconsfield's administration, April, 1880: 15 L. J., 227.

² Appointed under Gladstone's administration, April, 1880: 15 L. J., 227.

³ Died August 21, 1879: 15 L. J., 115.

⁴ Appointed to fill vacancy of Lord Gordon, April, 1880: 15 L. J., 115, 234.

⁵ Died June 18, 1877: 12 Law Jour., 372.

⁶ Retired on account of ill health, October, 1877: 63 L. T., 417.

⁷ Appointed June, 1877, in place of Lord Justice MELLISH: 12 Law Jour., 386.

⁸ Appointed Nov. 1877, in place of Lord Justice AMPHLETT: 12 Law Jour., 631.
 Died October 20, 1880: 15 L. J., 507, 508, 518, 527; 69 L. T., 419, 433.

⁹ Appointed April 30, under the act of April 24, 1877: 12 Law Jour., 251.

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Right Hon. Sir JOHN DUKE COLERIDGE,² Lord Chief Justice of England,
appointed Dec. 1, 1880.

Hon. Sir JOHN MELLOR, ³	appointed 1861.
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Hon. Sir JOHN WALTER HUDDLESTON,	" 1875.
Hon. Sir HENRY HAWKINS,	" 1876.
Hon. Sir JAMES FITZ-JAMES STEPHEN, ⁹	" 1879.

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CHIEF JUDGE IN BANKRUPTCY.

Hon. Sir JAMES BACON, Vice-Chancellor.

JUDGE OF THE COURT OF ARCHES.

LORD PENZANCE, appointed 1875.

¹ Died Nov. 20, 1880: 15 L. J., 576, 589; 15 Am. L. Rev., 134.

² Appointed to fill vacancy occasioned by death of Lord Cockburn.

³ Resigned June 11, 1879: 14 Law Journal, 365; 67 Law Times, 127.

⁴ Appointed June 11, 1879: 14 Law Journal, 365; 67 Law Times, 127.

⁵ Appointed March 1, 1881.

⁶ Appointed March 1, 1881; died March 23, 1881.

⁷ Died Sept. 18, 1880: 15 Law Jour., 459; 69 Law Times, 359, 367.

⁸ Resigned January, 1879: 14 Law Jour., 15; 66 Law Times, 191.

⁹ Appointed Jan. 1879, in place of Baron CLEASBY: 14 L. Jour., 34; 66 L. T., 191

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 DETERMINED BY THE
 CHANCERY DIVISION
 OF THE
 HIGH COURT OF JUSTICE,
 AND BY THE
 CHIEF JUDGE IN BANKRUPTCY,
 AND BY THE
 COURT OF APPEAL
 ON APPEAL FROM THE CHANCERY DIVISION AND THE CHIEF JUDGE
 AND IN
 L U N A C Y.

[9 Chancery Division, 159.]

V.C.H., June 28, 1878.

**In re* COX'S TRUSTS.

[159]

Will—Bequest of Share of Profits of Business—Ascertainment of Profits—Legates of Life Interest—Apportionment Act, 1870—"Dividends or other Periodical Payments."

A testatrix bequeathed a newspaper to trustees upon trust to continue the publication thereof as long as they thought fit, and to pay one-fourth share of the net profits to J. C. during his life, and after his death to his widow during her life; and the testatrix declared that no person entitled to participate in the profits should have any right to interfere in the management of the publication or the mode or time of ascertaining and dividing the profits thereof, but the same should be wholly in the discretion of the trustees, except that they should every January draw up a balance-sheet showing the net profits during the year ending on the then preceding 31st of December.

The trustees carried on the paper, gave notice to J. C. and the other beneficiaries that they intended, until further notice, to divide the net accrued profits half-yearly up to the 30th of June and the 31st of December in each year, and they did so divide the same up to the 30th of June, 1877.

On the 23d of December, 1877, J. C. died, and his widow claimed the one-fourth share of the net profits of the half-year ending on the 31st of December, 1877:

Held, first, that upon the terms of the will the person to take a share of the prof-

1878

In re Cox's Trusts.

V.C.H.

its must be living at the time when it was ascertained that there were profits to be divided; secondly, that the profits in question were neither "rents, annuities, dividends, or other periodical payments," within the meaning of the Apportionment Act, 1870; and, consequently, that that act did not apply, and the widow was entitled to the whole profits of the half-year in question.

PETITION. Mrs. J. C. Cox, the proprietor of *The Builder* newspaper, by her will dated in August, 1858, bequeathed the newspaper and all that appertained to it to trustees upon trust during so long as they thought fit to carry on and continue the publication of it, and after payment of all outgoings to apply the net profits in manner therein mentioned, being, as to one-fourth part thereof, upon trust to pay one-fourth share of such net profits to J. A. D. Cox during his life, and after his death to his widow, and after the death of the survivor then over; and the testatrix declared that no person entitled to participate in the profits, nor any other person except the trustees, should
160] have any right of control or *interference in relation to the management or carrying on of the publication, or the mode or time of ascertaining and dividing the profits thereof; but the same should be wholly in the discretion of the trustees, nor should any such person have any right of investigating the accounts of the publication, or any right to require information as to the affairs thereof, except that the trustees should in the course of every January draw up a concise statement or balance-sheet showing the net profits accrued during the year ending on the then preceding 31st of December; and every person interested in such profits should be entitled to inspect, and at his own expense to have a copy of, such statement or balance-sheet, and might, if dissatisfied therewith, require the account to which the same should relate to be investigated at his own expense by a professional accountant.

The testatrix died on the 14th of August, 1858. The trustees carried on the paper, and ascertained and divided the profits yearly, up to the 2d of August, 1870, when they gave notice to Mr. J. A. D. Cox and the other beneficiaries under the will, that they intended until further notice to make from time to time a half-yearly division of the net accrued profits up to the 30th of June and the 31st of December in each year.

This half-yearly division was accordingly made up to the 30th of June, 1877. On the 23d of December, 1877, Mr. J. A. D. Cox died, and the question having arisen whether, under the Apportionment Act, 1870, or otherwise, an apportioned part of the one-fourth share of the net profits for the

half-year ending on the 31st of that month belonged to his estate, or whether the same share was payable to his widow as the person entitled to the next life interest, the trustees paid the amount representing that share into court under the Trustee Relief Acts, and the widow now petitioned that it might be paid out to her.

Dickinson, Q.C., and *W. W. Karlake*, for the petitioner: There is nothing in the terms of the gift to make this share of profits apportionable between the successive tenants for life; and profits of a partnership business to be ascertained and paid by persons having such large discretionary powers are not "dividends or periodical payments" within the meaning of the Apportionment Act, 1870: [161 *Jones v. Ogle* ('). If not, there are no other words in the act which are applicable, and the petitioner is entitled to the whole amount paid in.

W. Pearson, Q.C., and *Hemings*, for the legal personal representative of J. A. D. Cox: The estate of J. A. D. Cox is entitled to an apportioned part of the sum paid in. In *Jones v. Ogle* the question was not between successive tenants for life, but between the estate of the testator and a person to whom he had given a life interest; and the testator was a partner in a private trading partnership in which the profits were not ascertained and divided at fixed periods, but depended upon the state of the business and the discretion of the managing partner. Here the will defines the rights of the parties. It is not a case of partnership. The profits must be divided, and must be ascertained at fixed periods, the trustees having only a discretion as to the mode or time of ascertainment and division, which discretion they have exercised by fixing half-yearly periods and dividing accordingly. These, therefore, were "periodical payments" within the meaning of the act. Moreover, they would be included in the word "dividends," and the will is within the operation of the Apportionment Act, although the testatrix died before the passing of that act.

[They cited *Capron v. Capron* ('); *Hasluck v. Pedley* ('); *Pollock v. Pollock* ('); *Lindley on Partnership* (').]

Wolstenholme, for the trustees.

HALL, V.C.: It appears to me that this case is not within the Apportionment Act, 1870. The case may be considered with reference to the Apportionment Act, and also upon

(1) Law Rep., 14 Eq., 419; Ibid, 8 Ch., 833. (2) Law Rep., 19 Eq., 271; 11 Eng. R., 192.

(3) Law Rep., 17 Eq., 288; 7 Eng. R., 840. (4) Law Rep., 18 Eq., 329; 9 Eng. R., 822.

(5) 4th ed., p. 1081.

the construction of this particular will independently of the act.

I will proceed to consider it in the first instance independently of the act. The testatrix directed the carrying on of 162] her business, *and gave the particular share with which we are dealing, viz., one-fourth of the net profits, to her trustees upon trust to pay the same to J. A. D. Cox during his life, and after his decease to his widow, the petitioner, Mary Cox, during her life, with a gift over. The gift, then, is a gift of profits. Now, in ascertaining the profits of a business, the usual course is to take a particular period of time between the day up to which the profits are to be brought into account and the last preceding day when a similar account was rendered.

In this case the testatrix left it entirely to the discretion of her trustees to fix the mode and time of ascertaining and dividing the profits; and that mode and time might apparently be changed from time to time. It is true that in the particular notice which the trustees gave they stated that they meant to divide the profits half yearly instead of yearly, and that course they continued. But it does not appear to me that the course so adopted can be taken as giving any title, in respect of that which was to be done at the end of the year, to a person who died before that time arrived. What was given to such person was merely given in the shape of a trust of profits, and such profits were to be ascertained at the end of the year.

Under the trusts, then, and independently of the act, I take it that, in order to be entitled to the benefit of the trust, the person to take must be living at the time when it was ascertained that there had been some profits in the preceding year. It may well be that in any given case the whole profits of a business have been made in one week, or even in one day. There is nothing which can enable me to say that the profits are to be spread over the whole year and divided between the beneficiaries according to the time during which each of them has lived. There is nothing in the circumstance that the gift is one of profits which can of itself create such a division. You must find something in the instrument itself. I am now speaking of the instrument independently of the act of Parliament. In all these cases it is to be observed that the first *cestui que trust* (where the Apportionment Act is not applied) comes in immediately for the whole benefit of the first division subsequent to the death of the testator. This testatrix died in the month of 163] August, therefore the first tenant for life *appar-

ently came in for the whole profits of the then current year, that is, he not only got the profits of five months, from August to December, but the profits for the whole twelve months up to December, that is to say, seven months in addition. That being so, it appears to me that upon this will there is nothing entitling Mr. J. A. D. Cox to anything except what was ascertained and determined to be profits accruing during his life. I cannot divide it or apportion it in any way whatever.

The question remains, whether the Apportionment Act, 1870, applies. That act cannot apply unless these profits are brought within the words "rents, annuities, dividends, or other periodical payments." Now to bring this case within the terms of the act these profits must be either "dividends" or "periodical payments." I do not consider that they are dividends in any sense. A share of profits is properly called a dividend when declared in respect of shares taken in a trading concern. There is nothing in the word "dividend" which could apply, even in any loose or popular sense, to a share of profits such as this. The business in this case was the testatrix's own, and shares in the profits of that business are not made dividends merely because several persons are interested in them. If, instead of the profits being divided into four shares, the whole profits had been given to one tenant for life, it could not have been said that such tenant for life was taking a dividend when in fact he got the whole. Nor can you say that a person is taking a "dividend" because he only gets an aliquot part of that whole. Then as to these being "periodical payments," from the words which are associated with this expression in the act of Parliament, viz., "rents, dividends, and annuities," I cannot consider a division of profits between several beneficiaries a "periodical payment" in any fair sense of those words within the meaning of the act. I come to that conclusion independently of authority, but that conclusion is, I think, fortified by the observations of Lord Selborne in the case of *Jones v. Ogle* (¹), referred to in the argument. I therefore hold that the petitioner is entitled to the entire income in question.

Solicitors: *Bockett & Son; Stevens & King.*

(¹) Law Rep., 8 Ch., 192.

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[9 Chancery Division, 164.]

V.C.H., June 29, 1878.

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*MASSEY V. ALLEN.

[1876 M. 265.]

Registration of Shares—Repudiation of Ownership—Winding-up—Contributory—Assignment to Company of Right to be indemnified—Action by Liquidator in the Name of Assignor—Issue joined—Application to examine Defendant allowed—Companies Act, 1862, s. 115—Costs.

M., at the request of A., who afterwards repudiated the ownership in them, and alleged that it was in H., agreed that shares in a company, subsequently ordered to be wound up, might be registered in his name as trustee. The shares were afterwards transferred to W., and in the liquidation M. was placed in the B list of contributories, and was required to pay the call made. M. in 1876 assigned to the company all right to be indemnified by A. and H., and under the power in the deed to sue in his name the liquidator, with the sanction of the court, brought an action in M.'s name against A. and H., to recover what was due on the shares, and for a declaration that they or one of them were or was bound to indemnify M. against all liability. Issue was joined in November, 1877. On an application by the liquidator under the 115th section of the Companies Act, 1862:

Held, that A. was a person liable to be summoned, as being capable of giving information in reference to the assets of the company, and that he must attend before the special examiner to be examined and answer all relevant questions.

[9 Chancery Division, 170.]

V.C.H., June 20; July 2, 1878.

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*SMITH V. CONDER.

[1874 S. 306.]

Will—Sums advanced by Testator—Direction in Will to account—Letters, subsequently, writing off Amounts—Hotchpot.

Testator, who died in 1874, by his will, in 1864, gave the residue of his property to trustees to divide amongst his six children equally, and directed that the sums of money advanced to them in his lifetime should be brought into hotchpot. He advanced to his two sons in and subsequent to 1869 several sums of money, and in 1878 he wrote a letter to each of them, stating that if he would give him a promissory note for the sum mentioned he would write off the balance:

Held, that, regardless of the letters, the sons must bring the whole of the sums advanced to them into hotchpot.

FURTHER consideration and summons to vary certificate.

This bill was filed in 1874 by James Smith (since deceased) and Harriet his widow (as administratrix under order to revive dated the 29th of April, 1878) for the purpose of obtaining a declaration that certain letters which passed between John Brett (Mrs. Smith's father), the testator in the cause, and James Smith, previously to the daughter's marriage, formed a contract which ought to have effect

given to it, and asking that the trusts of the testator's will might be carried into effect, and that the rights and interests of the plaintiffs and of the defendants, John Robert Brett and Arthur Brett, and others interested in the estates, might be ascertained and declared, and for consequential relief.

John Brett, who died in February, 1874, by his will, dated the 18th of April, 1864, after making a provision for his wife and bequeathing some legacies, gave his real estate and the residue of his personalty to trustees upon trusts for sale and conversion, and investment of the proceeds, as therein mentioned, and for division amongst all his six children, two sons and four daughters, equally, the shares of the sons to be paid at twenty-one years of age, and of the daughters at twenty-one years of age or marriage; and he declared that all such sums of money as he had then already advanced or should thereafter advance to or for the benefit of his children as should appear in any account in his handwriting *kept by him for that purpose, or as should [171 be shown in any other manner, should be considered and taken in full for, or, as the case might be, in part of, his or her share of and in the trust estate. The testator made a codicil in April, 1866, but as it affected only the share of Mrs. Smith it is not material to be mentioned.

A question had arisen in taking the accounts of the testator's personal estate in reference to the sums of money advanced by him to his two sons.

The testator wrote to his son John Robert a letter dated the 16th of January, 1873, in which he set forth the sums of money (in the aggregate £1,575) which he had advanced to him, and stated in effect that if he would send him a promissory note for £935 he would write off the balance; and he wrote to his son Arthur a letter dated the 17th of January, 1873, in which he set forth the sums of money (in the aggregate £1,760) which he had advanced to him, and stated in effect that if he would send him a promissory note for £1,110 he would write off the balance.

The Chief Clerk, in his certificate dated the 16th of May, 1878, set forth the dates on which the various sums of money were advanced, all being, in John Robert's case, on and after the 17th of January, 1869, and in Arthur's case on and after the 28th of September, 1869; and in taking the accounts he had allowed, in the case of John Robert, £500 and £140, together £640, "amounts written off as a gift as per letter of testator dated the 16th of January, 1873;" and in the case of Arthur, £500 and £150, together £650, "amounts written

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off as a gift as per testator's letter dated the 17th of January, 1873."

The Chief Clerk having given effect to the letters to the sons, minutes had been prepared which proposed to carry out the certificate in not requiring the sons to bring into account the two sums of £640 and £650. This was a summons on the further consideration of the cause to vary the certificate, asking that the sons might be ordered to bring the two sums before mentioned into account, in accordance with the terms of the will.

W. Pearson, Q.C., and *Romer*, for the plaintiff.

Robinson, Q.C., and *Whitaker*, for the defendants, the sons.

172] **Cozens-Hardy*, for the defendant Thomas Conder.

Lemon, for the defendants T. E. Conder and his wife.

Carson and *Bidwell*, for other parties.

The cases referred to, excepting that of *Ex parte Pye* (1), are noticed in the judgment.

HALL, V.C.: I hold that the proviso in the will as to the advances made by the testator must have effect given to it regardless of the letters which are relied upon as showing that the sons were not to be charged with more than the sums for which they were, as mentioned in those letters, to give promissory notes. The testator could not by his will by any express reference to future letters have incorporated such letters into his will, or regulated his dispositions in relation thereto, *Singleton v. Tomlinson* (2), and the letters are not admissible in evidence to construe or vary the operation of the will. *Kirk v. Eddowes* (3) is not an authority opposed to my opinion; on the contrary, the Vice-Chancellor said that declarations of the testator made at any other time than contemporary with the advance were inadmissible. To admit the letters would be to allow of an alteration of the will by an instrument not properly executed as a will. This is not the case of a presumption sought to be rebutted, but a case of express declaration contained in a testamentary instrument, which declaration it is sought to displace by declarations contained in instruments not testamentary.

I may mention that I have looked at the cases of *Whateley v. Spooner* (4) and *Quihampton v. Going* (5). As to *Whateley v. Spooner* the marginal note is stated as follows: "Direction in a will that all and every such sums of money

(1) 18 Ves., 140.

(2) 3 K. & J., 542.

(3) 3 App. Cas., 404; 24 Eng. R., 297.

(4) 24 W. R., 917.

(5) 3 Hare, 509.

which I have already advanced or may hereafter advance to my children as will appear in a statement in my handwriting should be brought into hotchpot: Held, that a subsequent unattested statement in testator's *hand- [173 writing was admissible in evidence of advances." I do not think that the marginal note accurately represents the Vice-Chancellor Wood's judgment. At all events, there is no such reference in the will in the present case to a statement as there was in the will in that case. In *Quihampton v. Going* (¹), in which it was held that the entries in the ledger were conclusive, they were read as incorporated into the will, but the entries were all made previously to the date of the will.

Solicitors: *John Croft; B. E. Greenfield; F. Stanley; Aldridge, Thorn & Morris.*

(¹) 24 W. R., 917.

See 25 Eng. Rep., 188 note.

In equity, generally, when land is conveyed to one person on the payment of the consideration by another, a resulting trust will be presumed in favor of him who pays the consideration.

Aliter, when the purchase is made by a husband and the conveyance is to the wife. In such case the presumption is that it was intended for the benefit of the wife.

Where a husband pays the consideration of a conveyance of land to his wife from a third person, the burden of proof is upon the husband to overcome the presumption and establish the truth: *Stevens v. Stevens*, 70 Me., 92.

Where a husband purchases real estate with his own money and causes the conveyances to be made to his wife, there is no presumption of a resulting trust, but *prima facie* this is a provision for the wife.

Evidence of declarations and of acts

of the wife is competent to show that the intention of the parties was that the wife should hold for the husband; and the finding of the jury as to the fact is conclusive: *Seibold v. Christman*, 7 Mo. App. Rep., 254.

A purchaser of land who pays the price and has the title made to another, for whom he is under a legal or moral obligation to provide, or towards whom he has placed himself *in loco parentis*, is presumed to be a settlement and not a trust for the purchaser; but such presumption may be rebutted by evidence.

A trust does not result in favor of a brother who purchases a homestead for his sisters, to whom he stands in *loco parentis*, and takes the title to the eldest and his aunt, although they subsequently permit him on reverse of fortune to live and build there, and the aunt reconveys to him her moiety: *Higdon v. Higdon*, 57 Miss., 264.

[9 Chancery Division, 173.]

V.C.H., July 5, 1878.

STIRLING-MAXWELL V. CARTWRIGHT.

[1878 M. 28.]

Administration—Jurisdiction—Domicil—Scotch Assets—Limited Administration.

Where the Probate Division of the High Court of Justice had granted a general probate of the will of a Scotch testator, the Chancery Division made the ordinary decree for the administration of the personal estate of the testator without limiting it to the English assets, and notwithstanding the opposition of a majority of the executors.

THE testator in this action, Sir William Stirling-Maxwell, of Pollok and Keir, was a domiciled Scotchman, and he made while at Venice a holograph will, which was unattested, but was validly executed according to the law of Scotland. By this will he appointed six persons his executors and the guardians of his infant sons, whose mother was dead, and to whom he left nearly the whole of his property. The testator had real estate of great value in Scotland, and personal estate there of the value of £200,000; he had no real estate in England, and his personal estate there consisted chiefly of a leasehold house, furniture, and library in Grosvenor Street, and was under £20,000 in value. Confirmation of the will was obtained by the executors in Scotland, upon production of which probate of the will in the ordinary form was granted to them by the Probate Division of the High Court of Justice, purporting to give them [174] administration of all and singular *the personal estate and effects of the deceased, the amount thereof being sworn under £20,000.

This action was then brought by one of the six executors, as the next friend of the infant sons of the testator, against the other five executors, in order to have his personal estate administered, and proper provision made for the maintenance and education of the infant plaintiffs.

Dickinson, Q.C., and *J. D. Davenport*, for the plaintiffs, asked for an ordinary administration decree, without limiting it to the personal estate in England.

Hastings, Q.C., and *Macnaghten*, for the defendants: The suit is entirely unnecessary, as due provision has already been made for the custody and education of the infant plaintiffs; but if it is to continue, then, as the testator was a domiciled Scotchman, and all his real estate and by far the larger portion of his personal estate is in

Scotland, any decree for administration to be made in this action should be limited to the English personalty, which alone can come to the executors by virtue of the English probate; and after payment thereof of the English debts, the balance of the English assets should be applied by the executors in accordance with the law of Scotland. This is what was done in *Preston v. Melville* (').

The administration of the personal estate of a domiciled Scotchman belongs to the Scotch courts, and it is settled that the English court has no jurisdiction to deal with anything but the assets locally situate in England, and it administers them by satisfying the English claims, and by handing over the surplus to the Scotch representatives: *Enohin v. Wylie* (').

The court has no doubt frequently administered personal estates, parts of which have been locally situate abroad, but this has always been by consent, and there is no case in which it has done so against opposition. The decree must be in the form of that in *Preston v. Melville*.

[They also referred to *Cook v. Gregson* (').]

**Dickinson*, in reply: In *Preston v. Melville* (') [175 the grant of letters of administration was limited to the personal estate in England, and the decree was limited accordingly; while in *Enohin v. Wylie* (') the question was whether the English courts would construe a foreign will, and that case is no authority for limiting the decree for administration to the English assets in a case where general probate of a Scotch will has been granted by the English court.

HALL, V.C.: It appears to me that in this case the decree must be the ordinary decree, and not limited to the property in England. The only authority cited in favor of the proposition that the decree should be so limited is the case of *Preston v. Melville*; but there the grant of letters of administration was in terms limited to the personal estate in England, that is not so in the present case, the grant here being general.

I cannot say that in the course of my experience I ever met with a decree so limited. The court is constantly dealing with estates portions of which are situate out of this country, and I never saw a decree limited to assets in England. The court always, according to my experience, makes the ordinary decree. I say nothing as to what the court would have done in case there had been proceedings in

(') 15 Sim., 35; 8 Cl. & F., 1.

(*) 10 H. L. C., 1, 15.

(*) 2 Drew, 547.

Scotland, and anything in the nature of a decree had been made there.

I see no reason why there should not in this case be the ordinary decree for administration. The decree must be so framed, and there must be an inquiry as to the outstanding personal estate in the usual form.

Solicitors: *Campbell, Reeves & Hooper; Freshfields & Newiman.*

See 18 Eng. Rep., 648 note; 24 Eng. Rep., 243 note; 11 Eng. Rep., 691 note; 1 Williams on Executors (6th Am. ed.), bottom paging, 362, 432; 2 id., 1430; 3 id., 1663, 1929.

The primary probate jurisdiction of everything pertaining to the settlement of estates is exclusively in the place of the domicile of the deceased: *Leonard v. Putnam*, 51 N. H., 247.

The general rule is, that a foreign representative will not be allowed to intermeddle with assets in the state: *Rucks v. Taylor*, 49 Miss., 532.

An action of debt will not lie against an administrator in one of the states, on a judgment obtained against a different administrator of the same intestate appointed under the authority of another state: *Stacy v. Thrasher*, 6 How. (U.S.), 44; *McLean v. Meek*, 18 How. (U.S.), 16.

The relations or privity between executors and their testators in Louisiana, do not differ from those which exist at common law.

The interest of an executor in the testator's estate is what the testator gives him, that of an administrator only—that which the law of his appointment enjoins.

Hence, executors in different states are, as regards the creditors of the testator, executors in privity, bearing to the creditors the same responsibilities as if there was only one executor.

Although a judgment obtained against an executor in one state is not conclusive upon an executor in another state, yet it may be admissible in evidence to show that the demand had been carried into judgment, and that the other executors were precluded by it from pleading prescription or the statute of limitations upon the original cause of action.

Therefore, where a person appointed

executors in Virginia and also in Louisiana, and the creditors obtained judgments against the Virginian executors without being able to obtain payment, and then sued the executors in Louisiana, the Virginian judgments were admissible evidence for the above-mentioned purposes: *Hill v. Tucker*, 13 How. (U.S.), 458.

One Sarah E. Little, a resident of Perry, Wyoming county, New York, died, leaving a last will and testament, which was duly admitted to probate by the surrogate of that county, by whom, on January 6, 1873, letters testamentary thereon were duly issued to one Page, one of the executors named therein. At the time of her death the testatrix owned certain personal property situated within this state, and also certain bonds and mortgages and promissory notes in the state of Michigan, the property in that state being held and managed for her by one Grant.

The testatrix gave certain legacies to persons named in the will, and then appointed "Henry V. Page my executor for carrying out the provisions of this my last will and testament, so far as they relate to parties and property in this state (in New York), and Charles N. Grant, of East Saginaw, and D. H. Jerome, of Saginaw City, Michigan, my executors for everything, so far as they relate to parties and property in the state of Michigan, and elsewhere."

Page never applied for letters testamentary or of administration in Michigan, but letters were duly issued out of the probate court of that state to the said Grant and Jerome, who qualified and acted as executors under the said will:

Held, that the title to the property of the testatrix, which was situated

outside of this state, did not vest in Page, but only the title to such as was within the state :

That he was not chargeable with or liable to account for property of the testatrix situated without this state, and which never came into his actual possession, nor was he bound to enter such property upon the inventory filed by him here :

That upon accounting for all the property of the testatrix, situated within this state, at the time of her death, he was entitled to be discharged : *Sherman v. Page*, 21 Hun, 59.

The rule that personal property is subject to the law which governs the person of its owner, as to its transmission by bequest or intestacy, though founded on international comity, is equally obligatory upon our courts as a legal rule of purely domestic origin.

A foreign administrator, though having no authority as such to coerce the collection of assets in this state, is equally accountable to the tribunal appointing him, where they are voluntarily paid or delivered to him here, as if they were collected within its jurisdiction.

An executor appointed in Connecticut receiving payment, without suit, from debtors of the decedent within this state, may account therefor to the probate courts of Connecticut ; and the fact that he subsequently takes out letters of administration in this state, does not make him liable to account here for such assets in the course of administration under the orders of the foreign tribunal. Whether the courts of this state are to decree distribution of the assets collected here under an ancillary administration granted by them, or to remit the disposition thereof to the courts of the testator's domicile, is not a question of jurisdiction, but of judicial discretion, upon the circumstances of the particular case.

The testator died a resident of Connecticut, as were his executors and legatees. Five-sixths of the estate was before the probate court of that state for accounting and distribution, and the executor desired to remit to that jurisdiction the distribution of the remainder which had been collected by virtue of administration granted to him by the surrogate of New York. Several of the legatees who, after the tes-

tator's death, became residents of this state, insisted that the distribution should be decreed by the surrogate of New York, to whom the executor had applied for a final settlement of his accounts. It appeared that the surrogate differed in opinion from the courts of Connecticut in reference to the construction of the will. Held, that the surrogate should have remitted the distribution to the courts of Connecticut : *Parsons v. Lyman*, 20 N. Y., 103.

Whether a deceased person died intestate or not, is to be determined by the law of the place where he was domiciled at the time of his death. That is the law which prescribes the requisites to the valid execution of a will of personal estate.

Our statute (Laws of 1830, p. 389, §§ 63-69) prohibiting the admission to probate of a foreign will of personal estate, unless executed according to the law of the place where it was made, relates only to the case of a person domiciled out of this state at the time of his death.

Accordingly, where a citizen of South Carolina executed his will in such manner as to be a valid bequest of personal property according to the law of that state, but not of New York, and subsequently established his domicile and died in this state ; held, that he died intestate in respect to personal property within our jurisdiction : *Moultrie v. Hunt*, 23 N. Y., 394.

Where one, domiciled in another country, dies leaving assets in this state upon which ancillary administration is had, the administrator of the domicile cannot withdraw or dispose of the assets in this state until the ancillary administration is settled whether there be debts in this state or not, and an assignment by the foreign administrator of a judgment recovered in this state is void : *DuVal v. Marshall*, 30 Ark., 230.

If ancillary administration is taken out in another state upon the estate there of a deceased citizen of Massachusetts, a judgment there rendered establishing a claim against the estate is not binding here, and cannot be proved against the estate here ; nor can the creditor establish his claim here against the executor, or against the legatees, to compel them to refund money paid to them by the executor

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after the time limited for the presentation of claims against executors, although the judgment was rendered after the expiration of such time: *Low v. Bartlett*, 8 Allen, 259.

Assets belonging to the estate of a testatrix, domiciled and dying abroad, should be remitted to the foreign executor for distribution according to the laws of the jurisdiction where the will was made and established: *Trimble v. Dzieduzyki*, 57 How. Pr., 208.

In the case of an ancillary administration in this state of the estate of a decedent whose domicile was in another state or country, the orphan's court, after having paid all lawful claimants on the fund who are citizens and residents of Pennsylvania, must direct the balance to be paid to the administrator of the domicile; and a creditor who has the same domicile as was that of decedent cannot make claim to the fund in this jurisdiction, but must resort to that of his domicile: *Barry's Appeal*, 88 Penn. St. R., 131, 6 Weekly Notes (Penn.), 383.

If the domiciliary administrator or executor has possession of a note payable to the decedent or bearer, or if he has paid the decedent's accommodation acceptance of a bill of exchange, he may sue in his own name in a foreign jurisdiction.

The principle that a grant of letters testamentary or of administration confers no power in a foreign state, applies without exception or qualification to ancillary administrations, but as to domiciliary administrations, are recognized exceptions.

The domiciliary administrator or executor may receive payment from, or sue a debtor residing in, a foreign jurisdiction, if he voluntarily comes within the state in which the administration is granted.

A voluntary payment to such executor or administrator by a foreign debtor, in a state where there are no debts and no ancillary administration, is a good acquittance, even if an ancillary administrator is afterwards appointed.

In the absence of special reasons making proper a distribution by the ancillary administrator, he should transmit the surplus, after paying citizens of the foreign state, to the domiciliary administrator, who is entitled thereto.

The principal administrator is the

owner of all debts due the intestate, the evidence of which, such as bills and notes, are in his possession wherever the debtor resides; but generally, must sue in a foreign jurisdiction by means of ancillary administration: *Klein v. French*, 57 Miss., 682.

A representative cannot sue in the courts of any state except that in which he was appointed. In case he desire to prosecute in the courts of any other state, he must procure new letters there.

Canada, Upper: See *Grant v. McDonald*, 8 Grant's Chy., 468; *Sutherland v. Ross*, 13 Grant's Chy., 507.

Kentucky: *Conner v. Paul*, 12 Bush, 144.

See statute referred to in this case.

Minnesota: See by statute: *Fogle v. Schaeffer*, 23 Minn., 304.

Mississippi: *Rucks v. Taylor*, 49 Miss., 552.

New Brunswick: *Mitchell v. Long*, *Chipman (MSS.)*, 76, and cases cited in note.

New Hampshire: *Carpenter v. Wild*, *Smith's Rep.*, 365; *Sabin v. Gilman*, 1 N. H., 193.

See *Taylor v. Barron*, 35 N. H., 484, 496; *Leonard v. Putnam*, 51 id., 247.

New Jersey: *Porter v. Trall*, 30 N. J. Eq., 106.

New York: *Smith v. Tiffany*, 16 Hun, 552-3; *McBride v. Farmers, etc.*, 26 N. Y., 450; *Paterson v. Chemical, etc.*, 32 N. Y., 21; *Parsons v. Lyman*, 20 N. Y., 103; *Matter of Webb*, 11 Hun, 124.

United States: *Mackay v. Central*, etc., 14 Blatchf., 65.

Wisconsin: In this state he may by statute: *Smith v. Peckham*, 39 Wisc., 414.

Query, what is the rule if a foreign representative take assets into a state? *Matter of Webb*, 11 Hun, 124.

In the following cases it was held he may be sued.

Tennessee: *Dillard v. Hains*, 2 Tenn. Chy., 190.

A foreign executor who, after proof of the will at the place of the testator's domicile in another state, comes into this state to reside and brings with him property belonging to the estate, cannot be made liable here upon the suit of a creditor of the testator to the extent of the property brought here.

The remedy of the creditor is in forum of the original administration.

There is a distinction as to the rights of creditors here, between the case of property thus brought into the state and that of property here, which the foreign executor comes here to secure: *Hedenburg v. Hedenburg*, 46 Conn., 80.

Except that if a cause of action arose in favor of the representative after the death of his testator or intestate, he may sue upon it personally: *Rucks v. Taylor*, 49 Miss., 552; *Nichols v. Smith*, 7 Hun, 580; *Barton v. Higgins*, 41 Md., 539; *Hall v. Harrison*, 21 Missouri, 227.

See *Lauder v. Smith*, 2 Labatt (Cal.) R., 88.

A foreign executor cannot collect and administer assets due the testator in this state: *Barton v. Higgins*, 41 Md., 539.

Where there are two personal representatives of a decedent in different states, the one in the state where the debtor resides is entitled to recover, even though the other sue the debtor in his state: *Holyoke v. Union*, etc., 10 N. Y. Week. Dig., 530, Supreme Court, Second Dept., citing *Beers v. Shannon*, 73 N. Y., 292.

A foreign administrator who has not administered in Pennsylvania cannot be sued there by a non-resident: *Magraw v. Irwin*, 87 Penn. St. R., 189, 85 Leg. Int., 292, dissenting from *Swearingen v. Pendleton*, 4 Serg. v. Rawle, 389, and *Evans v. Tatem*, 9 id., 252, and explaining *Moore v. Field*, 42 Penn. St. R., 467.

See 1 Williams on Executors (6th Am. ed.), 362 bottom paging, 420 top paging.

In New York it is held, that the courts of that state have no jurisdiction of an action at law against a foreign executrix: *Field v. Gibson*, 20 Hun, 274, 277, and cases cited.

Otherwise as to equitable suits: *Field v. Gibson*, 20 Hun, 277-8, and cases cited.

Personal representatives appointed in one state may be sued in another, but the assets of the deceased will be distributed among the creditors and next of kin by the courts of such state where they are sued according to the law of the state where such representatives were appointed: *Johnson v. Jackson*, 56 Geo., 326.

A bill to compel a settlement and distribution of an estate, by persons

whose sole right is derived under the will of an heir or distributee, entitled to share in it, cannot be maintained unless it shows that the testamentary paper, upon which their rights depend, has been duly admitted to probate in this state: *Wood v. Matthews*, 53 Alabama, 1.

Plaintiff's intestate and defendant were domiciled in North Carolina, where, on the death of the intestate, administrators were appointed, upon whose application plaintiff was appointed by the surrogate of Ontario county in this state, there being assets of the deceased in said county. This action was brought to recover certain moneys alleged to have been received by the defendant in the lifetime of the deceased, and for his use. The action was commenced by personal service of the summons upon the defendant while he was in this state for a temporary purpose. Held, that although, as a general rule, simple contract debts were assets at the place where the debtor resided at the time of the death of the creditor; yet, as the debtor had voluntarily come into this state, and as there was no intent to defraud the North Carolina administrators, and as he had not paid the debt or been sued upon it in North Carolina, the debt became assets in this state, and the plaintiff was entitled to recover here for the same: *Fox v. Carr*, 16 Hun, 494.

Where F., domiciled in Nebraska, dies, leaving personal property in Kansas, and administration is duly taken out at the place of his domicile, and the administratrix so appointed takes peaceable possession of such property in Kansas, and there is no opposing administration in that state, and no local creditors, the courts of that state will *ex comitate* recognize her possession as rightful, and protect as fully as though she had there taken out letters: *Denny v. Faulkner*, 9 Cent. and J., 32, 22 Kans., 89.

Foreign receivers and trustees may sue in another state: *Pugh v. Hearrt*, 52 How. Pr., 23; *Bidlock v. Mason*, 26 N. J. Eq., 280; *Hurd v. Elizabeth*, 41 N. J. Law R., 1, 40 id., 218; *National*, etc. v. *Murphy*, 80 N. J. Eq., 408; *Domestic*, etc., v. *Sayler*, 86 Penn. St. R., 291; *Kronberg v. Elder*, 18 Kans., 150; *Pond v. Cooke*, 45 Conn., 126.

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A declaration in such case must state facts showing the plaintiff's legal appointment, and that it vests the cause of action in him: *Hurd v. Elizabeth*, 40 N. J. L., 218; *Kronberg v. Elder*, 18 Kans., 150.

Where a guardian and ward live in another state, the guardian may file a bill in this state for sale of the ward's real estate, and is entitled to the possession of the proceeds of sale, upon executing in the court having control of them a bond for their proper management and application: *Hickman v. Duley*, 2 Lea (Penn.), 375; *Vincent v. Starks*, 45 Wisc., 458.

But see *Trimble v. Dzieduzyiki*, 57 How. Pr., 208.

Requisites of complaint in Wisconsin: *Vincent v. Starks*, 45 Wisc., 458.

In New Hampshire it is held, that the rights and powers of guardians are considered as strictly local, and as not entitling them to exercise any authority over the person or personal property of their wards in other states: *Leonard v. Putnam*, 51 N. H., 247.

A foreign executor or administrator may sell or assign property belonging to, or a claim in favor of, his testator or intestate; 1 *Williams on Executors* (6th Am. ed.), 362, 432; 2 id., 1430; 3 id., 1663, 1929 bottom paging, and many cases cited.

Canada, Upper: *Hard v. Palmer*, 20 U. C. Q. B., 208, 21 id., 49.

But see, *In re Thorpe*, 15 Grant's Chy., 76; *Grant v. McDonald*, 8 id., 468.

Massachusetts: *Clark v. Blackington*, 110 Mass., 369.

New York: *Peterson v. Chemical*, etc., 2 Rob., 605, 27 How., 491, 29 id., 240, 32 N. Y., 21; *Middlebrook v. Merchants' Bank*, 41 Barb., 481, 18 Abb., 109; *Smith v. Tiffany*, 16 Hun, 552.

The statute of Missouri does not authorize a suit, by a public administrator in that state, against a foreign insurance company doing business there, to enforce the payment of a policy of insurance, not made or to be executed in that state, upon the life of a citizen of Wisconsin who neither resided, died, nor left any estate in Missouri: *Ins. Co. v. Lewis*, 97 U. S., 682.

See *Beers v. Shannon*, 73 N. Y., 292.

Executors of a decedent, whose domicil was in Cuba, have no authority

under letters testamentary in Cuba to transfer stock in Pennsylvania.

The purpose of the acts of March 15, 1832, § 6, and March 29, 1832, § 7, was to prevent the estates of non-residents from being withdrawn from our jurisdiction, to the prejudice of those interested in the distribution.

Under the act of June 16, 1836, § 3, executors under authority of a foreign country cannot transfer stocks, etc.: those of a sister state may.

In many respects the sister states are not to each other as foreign states.

There is no distinction here between the powers of a foreign executor and as administrator: *Alfonso's Executors Appeal*, 70 Penn. St. R., 347.

Real estate in Canada will not pass to an assignee in bankruptcy appointed under the bankruptcy laws of the United States, though the debtor also assign to the assignee: *MacDonald v. The Georgian*, etc., 2 Canada Supreme Ct. R., 864.

In such case the assignment, being made as a step in legal proceedings, has no greater force than the proceedings themselves have: *Rockwell v. McGovern*, 69 N. Y., 294, distinguishing *Rockwell v. Brown*, 54 N. Y., 210.

A foreign assignee of a voluntary assignment for the benefit of creditors, obtains good title so far as personal property is concerned, and may sue in another state: *Fuller v. Steiglitz*, 27 Ohio St. R., 355.

Where property has once vested in an assignee or receiver by the law of the state where the property is situated, the law of another state will not divest him of his right to it, if he should take it into such state in the performance of his duty: *Pond v. Cook*, 45 Conn., 126.

A promissory note, payable generally, was executed by a resident of this state. The payee died in Massachusetts, where plaintiffs were appointed administrators of his estate. At the time of the payee's death, and of the commencement of this suit, the maker resided in Connecticut, but resided in Massachusetts at the time of trial in a suit on the note in this state summoning a trustee resident here; it was held that plaintiffs could maintain the suit as administrators, by virtue of their ap-

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pointment in Massachusetts: Purple v. Whithed, 49 Verm., 187.

Where a widow invested assets in lands in another state, it was held the courts of the state where she was ap-

pointed could compel her to convey such lands to the administrator for the benefit of the creditors and distributees of the estate: Miller v. Birdsong, 7 Baxter (Tenn.), 531.

[9 Chancery Division, 176.]

Fry, J., March 5, 1878.

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[1876 F. 144.]

Lapse of Time—Injunction in Aid of Legal Right—Action of Deceit—Statute of Limitations.

When an injunction is sought in aid of a legal right, the court is bound to grant it if the legal right is established.

Therefore mere lapse of time will not be a bar to the granting of the injunction, unless it would be a bar to the legal right.

To an action for an injunction to restrain the defendant from representing that the business carried on by him was the same as that carried on by the plaintiff, it was objected that the plaintiff had known for between two and three years before issuing his writ the facts on which he relied:

Held, that this delay was no bar to the action.

THE plaintiff, R. J. Fullwood, carried on the business of manufacturing annatto (a substance used for coloring cheese and butter), at 24 Somerset Place, Hoxton. The business was commenced by the plaintiff's father at the same place in the year 1785, and he carried it on until his death in 1832. The plaintiff and his three brothers, one of whom was the defendant Matthew Fullwood, then succeeded to the business, but ultimately the right to carry it on became vested in the plaintiff alone, and he carried it on under the firm of R. J. Fullwood & Co. In the year 1835 the defendant Matthew Fullwood (who was entitled to make annatto from the same receipt as the plaintiff, and to sell it under the same name) set up in Buckingham Street, Strand, a separate business of his own for the manufacture and sale of annatto, and carried it on under the firm of M. Fullwood & Co. In the year 1873 he took the defendant Edward Fullwood into partnership with him, and the business was afterwards carried on under the firm of E. Fullwood & Co. The defendant, E. Fullwood, had previously carried on at 1 and 2 Somerset Place, Hoxton, the business of an importer and manufacturer of asphalte, under the firm of E. Fullwood & Co. He discontinued that business shortly after the commencement of his partnership with the other defendant. *The defendants sent out with the [177

annatto which they sold, and distributed in other ways, a card as follows:

“Established over 85 Years.

“E. Fullwood & Co.,

“(late of Somerset Place, Hoxton),

“Original Manufacturers of Liquid and Cake Annatto,

“Wholesale and for Exportation,

“19 Buckingham Street, Strand.”

Over the words E. Fullwood & Co. there was printed as a trade-mark the head of the Queen, which differed from the plaintiff's trade-mark, which was a stag. The defendants also placed round the bottles in which they sold their annatto a wrapper resembling that which the plaintiff used, there being printed on it the words:

“E. Fullwood & Co.,

“Annatto and Antiseptic Manufacturers,

“19 Buckingham Street, Strand, London,

“Established 1785.”

The plaintiff alleged that the effect of these cards and wrappers was to represent that the business of the defendants was the same as that of the plaintiff, and that the annatto sold by them was manufactured by the plaintiff, and he claimed an injunction. The writ was issued on the 14th of November, 1876. By their statement of defence the defendants alleged that “the plaintiff has known for a period of at least between two and three years all the material facts stated in the pleadings in this action, and in the early part of the year 1875 he added to his public advertisements the words following: ‘The parties lately advertising Fullwood's Annatto, Buckingham Street, Strand, have no title to make use of the address Somerset Place, Hoxton, London.’ And the defendants submit that after such a lapse of time this action cannot be sustained.”

This was the trial. The plaintiff adduced no evidence to show that any persons intending to deal with him had been deceived.

Fischer, Q.C., and *Whitehorne*, for the plaintiff: The defendants' cards and wrappers are calculated to deceive. [178] **Churton v. Douglas* (') is an authority in our favor. There has been no delay such as to disentitle the plaintiff to relief.

North, Q.C., and *T. L. Wilkinson*, for the defendants: Our cards and wrappers are not calculated to deceive. At

any rate, the plaintiff has not been prompt enough in coming to the court.

[FRY, J.: The rule that a plaintiff must be prompt applies to the discretionary jurisdiction of the court. But this action is in the nature of an action for deceit, the injunction is only sought in aid of a legal right. Can the court cut down the limit of six years imposed by the Statute of Limitations on the assertion of the legal right? The matter was discussed in *Gaunt v. Fynney* (*).]

In the old Court of Chancery parties were often left to their legal rights on the ground of delay: *Kerr on Injunctions* (*); *Cooper v. Hubbuck* (*); *Richards v. Revitt* (*).

FRY, J.: In my judgment this is a very plain case. Of course I need not say that the defendants are entitled to carry on their business under the firm which they have adopted, if they are so minded, and to carry it on where and as they like, provided that they do not represent themselves to be carrying on the business which has descended to the plaintiff.

But it appears to me that by the cards and wrappers which the defendants are proved to have used, they have been attempting to represent that the business which they carry on is the business of which the plaintiff is now the proprietor. The only defence which it is necessary for me to observe upon is this. It is said that in 1875 the plaintiff became aware of what the defendants were doing. Now, assuming, as I will, for the purpose of my decision, that in the early part of 1875 the plaintiff knew of all the material facts which have been brought before me to-day, he commenced his action in November, 1876. In my opinion that delay, *and it is simply delay, is not sufficient [179 to deprive the plaintiff of his rights. The right asserted by the plaintiff in this action is a legal right. He is, in effect, asserting that the defendants are liable to an action for deceit. It is clear that such an action is subject to the Statute of Limitations, and it is also clear that the injunction is sought merely in aid of the plaintiff's legal right. In such a case the injunction is, in my opinion, a matter of course if the legal right be proved to exist. In saying that I do not shut my eyes to the possible existence in other cases of a purely equitable defence, such as acquiescence or acknowledgment, and the various other equitable defences which may be imagined. But mere lapse of time, unaccompanied by anything else (and to that I confine my observa-

(*) Law Rep., 8 Ch., 8; 4 Eng. R., 718.

(*) 2d ed., p. 372.

(*) 30 Beav., 160.

(*) 7 Ch. D., 224; 23 Eng. R., 539.

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tions) has, in my judgment, just as much effect, and no more, in barring a suit for an injunction as it has in barring an action for deceit. In my judgment, the same rule applies since the Judicature Act as formerly applied in the Court of Chancery when the legal right had to be determined in an action at law. There is, therefore, no defence to this action, and the injunction must go. It will be to restrain the defendants, &c., from publishing or continuing to publish, and from distributing, any of the cards or wrappers to which I have referred (of course they must be identified), and from representing or stating that the business now or formerly carried on by the defendants in the manufacture and sale of annatto was established in or about the year 1785, or that it has been lately carried on at Somerset Place, Hoxton; and from representing that the said business is identical with, or in any way connected with, the plaintiff's business; and also from representing that the annatto manufactured and sold by the defendants is manufactured by the plaintiff. The defendants must pay the costs of the action.

Solicitors for plaintiff: *Nash & Field.*

Solicitors for defendants: *Wilkins, Blyth & Fanshawe.*

[9 Chancery Division, 180.]

Fry, J., March 27, 1878.

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[1877 H. 220.]

Vendor and Purchaser—Specific Performance—Vendor entitled to Part only.

Where two persons agreed to sell property, of whom one was entitled to a moiety subject to a mortgage for its full value, and the other had no interest:

Held, that a judgment for specific performance with abatement might be made against the former.

W. E. RIGBY and William Henry Linell claimed to be entitled to a public house and other hereditaments at Macclesfield for the residue of a term of 999 years, and by an agreement made on the 16th of January, 1877, between Rigby and William Henry Linell of the one part, and the plaintiff T. Horrocks of the other part, Rigby and William Henry Linell agreed to sell, and the plaintiff to purchase, the public house and other hereditaments, subject to the annual chief or ground rent of £36 or thereabouts, and also subject to a mortgage thereon for £400, and other incumbrances (if any), and lessees' covenants and conditions affecting the same, for the sum of £200.

On examining the title it was discovered that William

Henry Linell had no interest in the property, but that Rigby was entitled to one moiety thereof, and one Henry Richard Linell to the other moiety. It was further found that the mortgage mentioned in the agreement was a mortgage of only the moiety of the property belonging to Rigby, on which the sum of £240 remained due at the date of the contract to R. Clarke, the mortgagee. Clarke afterwards agreed to purchase the whole, and on the 27th of August, 1877, took a conveyance of the legal estate from Rigby and Henry Richard Linell.

Horrocks was willing to accept performance of the contract as to Rigby's moiety, on an abatement from the purchase-money and an apportionment of the chief rent, and brought this action against Rigby and Clarke, praying that Rigby might be ordered specifically to perform the said contract so far as his moiety of the *property was [181] concerned, and that he and Clarke might be ordered to assign to the plaintiff the said moiety for the residue of the term for which the property was held, subject to the payment of one half part of the chief rent issuing out of the entirety of the said property, with an abatement from the said purchase-money of one half thereof, and that the purchase-money payable in respect of such moiety might be paid to Clarke towards the discharge of his mortgage debt.

The defendants Rigby and Clarke, by their statements of defence, took several objections to the performance of the contract as to the moiety, which objections were either abandoned at the hearing or overruled by the court, and Clarke, by counter-claim, sought a foreclosure; the only questions raised which call for a report being whether specific performance as to one moiety would, under the circumstances, be granted, and how the mortgage to Clarke was to be dealt with.

Cookson, Q.C., and *F. T. Procter*, for the plaintiff: The purchaser has a right to take so much of the property as the person who has contracted to sell may have: *Sugden's Vendors and Purchasers* (1); *Hooper v. Smart* (2); *Barnes v. Wood* (3); *Attorney-General v. Day* (4); *Dart's Vendors and Purchasers* (5). *Jones v. Evans* (6) was a peculiar case. As to the mortgage money, the plaintiff has a right to set off the purchase-money as far as it goes. No doubt Rigby will not receive anything, but the contract is not without

(1) 18th ed., pp. 257, 263.

(2) *Law Rep.*, 18 Eq., 683; 11 Eng. R., 608.

(5) *Law Rep.*, 8 Eq., 424.

(4) 1 Ves. Sen., 218.

(3) 5th ed., p. 1066.

(6) 12 Jur., 664.

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consideration, as he will be relieved from the debt and from the liabilities under the covenants in the lease.

Fillan, for Rigby: Decreeing specific performance in such a case is discretionary, *Hooper v. Smart* ('); and will not be exercised where the injustice is too great. Here Rigby will actually receive nothing. In *Wheatley v. Slade* (') specific performance under similar circumstances was refused.

182] **North*, Q.C., and *Warmington*, for Clarke.

FRY, J., after stating the facts of the case, continued:

The plaintiff is, therefore, incumbered with several difficulties in respect of this contract. In the first place, he has entered into a contract with two persons as tenants in common for the sale of the entirety. It is found that one of those supposed tenants in common has no interest whatever in the property, and the question then is, whether the plaintiff can enforce against the other a conveyance so far as it relates to his moiety.

In my opinion the plaintiff can enforce it. I think that where an agreement is entered into by A. and B. with C. and it afterwards appears that B. has no interest in the property, A. may nevertheless be compelled to convey his interest to C. I should have come to that conclusion upon principle, for I do not see why a purchaser is to lose his right against a vendor who can complete, because from a circumstance of which the purchaser had no knowledge, he has no right against persons who cannot complete. But I am very much fortified in that conclusion by a passage in the judgment of Lord Hardwicke in *Attorney-General v. Day* ('). There he was dealing with the case of a contract entered into between tenants in common in tail, and he assumes the death of one of them leaving heirs in tail. He points out that whereas the contract could have been enforced against the contracting tenant in tail, it could not be enforced against the issue of the tenant in tail because they claim *per formam doni*, and are not subject to the contract of the previous tenant in tail. He points out further that the one tenant in tail could not enforce against the purchaser the performance of the contract with regard to the moiety of which he was possessed; but, contemplating the alternative case, that of the enforcement of the contract by the purchaser against the vendor, Lord Hardwicke says ('): "On the other hand, if on the death of one of the tenants

(') Law Rep., 18 Eq., 683-685; 11 Eng. R., 608.

(*) 4 Sim., 126.

(*) 1 Ves. Sen., 218.

(*) 1 Ves. Sen., 224.

in common who contracted for a sale of the estate, the purchaser brings a bill against the survivor desiring to take a moiety of the estate only, the interest in the money being divided by the interest in the *estate, I should think [183 (though I give no absolute opinion as to that) in the case of a common person he might have a conveyance of a moiety from the survivor, although the contract cannot be executed against the heir of the other." It appears to me to be immaterial whether the impossibility arises from the death of the contracting party leaving heirs in tail who take *per formam doni*, or from the fact that one of the contracting parties cannot perform the contract. Lord Hardwicke's opinion is that the inability with regard to one moiety would not preclude the purchaser from having performance with regard to the other moiety, and I so hold.

The next question which arises is this. It appears that instead of the entirety of the property being subject to the mortgage, one moiety of the property only is subject to the mortgage, and the question is, what is the effect of that as to the purchase-money which would be payable in respect of that moiety. Now, taking this particular case, £200 being the purchase-money for the entirety of the equity of redemption, £100 would obviously be the purchase-money to be paid to Rigby for his moiety if there were no incumbrances; but there is an incumbrance on that moiety. The reason of the case, therefore, requires that inasmuch as the purchaser can get only the moiety of the equity of redemption, and has to bear, not the moiety but the entirety, of the incumbrance, that the one moiety of that incumbrance which he did not expect to bear should be set off against the purchase-money which he did expect to pay.

The result is, that the vendor, by representing that the incumbrance was upon the entirety and not upon the moiety, has cast upon the moiety an amount of incumbrance which neither he nor the purchaser contemplated as falling on that moiety. But it being conceded in this case that the purchase-money of the moiety was £100, and that the mortgage upon that moiety exceeds £200 by more than £100, it follows that the deduction so to speak, from the purchase-money is larger than the purchase-money itself, and that no sum at all will come to the vendor Rigby. Therefore, all I can do is to say, that, in my judgment, the plaintiff is entitled to a conveyance of Rigby's moiety upon entering into covenants to pay the rent, and to perform the covenants in the original *lease, and to pay the entire [184

mortgage money and interest due to Clarke, and to indemnify Rigby in respect of those liabilities.

It has scarcely been suggested on behalf of the defendants in this case, that such a contract could not be enforced, because no consideration was moving from the plaintiff to Rigby. That contention, if it had been seriously made, would not be sustainable, because it is quite evident that the covenants into which the plaintiff enters with Rigby are valuable consideration. The case of *Price v. Jenkins* (1) would be ample to cover that point.

The question remains to be considered, what am I to do with the costs of this action. [His Lordship concluded that as both Rigby and Clarke had set up untenable defences, and as Clarke was a necessary party, having chosen to take a conveyance of the legal estates, the defendants must pay the costs of the suit; but there must be judgment for Clarke on his counter-claim as in an action for foreclosure.]

Declare that the plaintiff is entitled to an assignment of one moiety of the property so far as the interest of W. E. Rigby in the same is concerned, subject to Clarke's mortgage. Order that W. E. Rigby, and Clarke so far as he may be interested in the said premises by virtue of the said indenture of the 27th of August, 1877, do execute an assignment of the same to the plaintiff, such assignment to contain the usual covenants on the part of the plaintiff to pay rent, keep down interest on incumbrances, and to indemnify W. E. Rigby.

Direct accounts of what is due to Clarke, deducting the plaintiff's costs of the suit.

Upon the plaintiff paying to Clarke what shall be certified to remain due to him, Clarke do, at the costs of the plaintiff, reassign, &c.; but in default of the plaintiff paying to Clarke what shall be so certified to remain due to him as aforesaid, the plaintiff is to be foreclosed, &c.

Solicitors for plaintiff: *Stephens & Stephens.*

Solicitors for defendants: *Andrew & Wood*, agents for J. W. Johnston, Stokeport.

(1) 5 Ch. D., 619.

See 20 Eng. Rep., 701 note.

In an action to compel the specific performance of a contract to convey land entered into by the defendant, the court found in favor of the plaintiff, and directed that the wife of the defendant join with him in executing the deed, and that if she refused, the value of her inchoate right of dower be retained out of the purchase price, and the balance paid to the defendant.

Held, that a court of equity will not compel specific performance of a contract to convey land where a wife, not a party to the contract, refuses to join in the deed, and that plaintiff must either take the title subject to the claim of the wife, and pay the stipulated price, or resort to his legal remedy for the damages sustained by the defendant's breach of the contract: *Dixon v. Rice*, 16 Hun, 422.

[9 Chancery Division, 185.]

Fry, J., March 13, 28, 1878.

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[1876 P. 271.]

Trustee Relief Act (10 & 11 Vict. c. 96), s. 2—Payment Out—Petition—Action.

Applications for payment out of court of a fund paid in under the Trustee Relief Act must be made by petition and not by action; and a person not named in the trustee's affidavit may petition for payment out of court. But where an action has been brought the court may make a declaration of right, leaving the payment to be obtained on petition.

[9 Chancery Division, 189.]

Fry, J., May 1, 2, 1878.

*BRADLEY V. RICHES.

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[1876 B. 128.]

Mortgage—Priority—Trustee—Solicitor—Possession of Deeds—Register—Notice.

The plaintiff through his solicitor contributed £500 and the solicitor £300 to a loan of £800 on deposit of deeds. The solicitor subsequently took a mortgage to himself for the £800. The solicitor afterwards deposited the title-deeds of the mortgaged property with a bank as security for a loan of £400:

Held, that the plaintiff had priority for his £500 over the security to the bank.

The plaintiff had lent money to a solicitor on the security of the deposit of title-deeds of land in Middlesex with a letter charging the land, the legal estate in which was outstanding. The solicitor afterwards, by way of security for money due to a client, made a mortgage of the land to the client, which mortgage was registered:

Held, that the client must be presumed to have had notice of the plaintiff's charge, which therefore, though unregistered, retained priority.

The presumption that a solicitor has communicated to his client facts which he ought to have made known cannot be rebutted by proof that it was the solicitor's interest to conceal the facts.

THIS was an action for foreclosure brought by W. G. Bradley, the mortgagee, against Henry Jonathan Riches, the mortgagor, and Thomas Brooks, the trustee in the bankruptcy of Riches, and against the Union Bank of London, mortgagees of part of the property mortgaged to Bradley, and against the Rev. F. T. Woodman, mortgagee of other part, the plaintiff claiming priority over the bank and over Mr. Woodman.

The case as between the plaintiff and the bank was as follows: In the month of July, 1870, Riches, who was the solicitor of Bradley, asked him to advance £500 towards a loan of £800 to one Dr. Kenny, on the security of a house at Richmond, called Arundel Villa, Riches advancing the other £300. Bradley accordingly gave Riches £500, and

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received from him a letter, dated the 27th of July, 1870, as follows:—

“ I acknowledge that you advanced my client, Dr. William Kenny, of Arundel Villa, Richmond, the sum of £500 [190] on the security *of his house (as above), and upon which property I have made an additional advance of £300, making together £800; and under the terms upon which the loan was advanced I engage as well on my part as that of my client to repay the loan on demand, together with interest thereon at and after the rate of £6 per cent. per annum from the date of such advance until liquidation; and I further engage, if called upon by you, to deliver over the title-deeds to you and in the meanwhile to hold them to your order.”

It did not appear when the £800 was advanced to Dr. Kenny, but by an indenture of mortgage dated the 31st of January, 1873, made between Dr. Kenny of the one part and Riches of the other part, in consideration of the sum of £800 stated to have been advanced to Dr. Kenny by Riches, Dr. Kenny granted and demised the house at Richmond to Riches for the residue of a term of eighty-nine years, by way of mortgage to secure the repayment by Dr. Kenny to Riches of the sum of £800, together with interest thereon after the rate of £5 per cent. per annum.

On the 6th of June, 1873, Riches obtained from the Union Bank of London an advance of £400, and deposited with the bank the title-deeds relating to the house at Richmond, including the mortgage deed, and also gave the manager of the bank a letter charging as security for the £400 the house at Richmond of which he was the mortgagee as aforesaid, and agreeing to execute a proper legal mortgage of the said security whenever called upon. The title-deeds had remained in the possession of the Union Bank, and the bank alleged that they had advanced the £400 in the belief that the said sum of £800 belonged entirely to Riches, and they denied that they had any knowledge of any interest of Bradley in the mortgage until December, 1876, Riches having on the 16th of September, 1876, been adjudicated bankrupt.

North, Q.C., and Speed, for the plaintiff.

Cookson, Q.C., and Bardswell, for the Union Bank: This mortgage was made to Riches as if the money was his own. He had the deeds, and the bank could have no means of knowing that the money was not his own. If the beneficial owner allows his trustee to deal in this manner, the loss

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should fall upon him, *and not upon others whom [191 he has allowed to be misled. Mr. Bradley should have taken the deeds: *Eyre v. Burmester* (*); *Layard v. Maud* (*); *Stackhouse v. Countess of Jersey* (*); *Perry-Herrick v. Attwood* (*).

[FRY, J., referred to *Shropshire Union Railways and Canal Company v. Reg.* (*).]

No doubt as a general rule a man has a right to leave his deeds in the possession of his solicitor, but here he has allowed his solicitor to appear as the owner of the money also. Why did not Mr. Bradley have a memorandum indorsed on the mortgage deed? Besides, the money was advanced in 1870, and the mortgage was not made until 1873, and is at a different rate of interest; nor has the plaintiff's money been traced in any way. In fact, he allowed Riches to have £500, and is now only a general creditor on the estate of Riches for that amount. What defence would the bank have against the trustee in Riches' bankruptcy claiming all this money?

FRY, J., after stating the facts of the case, continued: It is clear that the £500 paid by the plaintiff was held by Riches on an express trust to make an advance to Dr. Kenny, and that any security taken for the £800 would be held by Riches as to £500 as trustee for the plaintiff; and I do not think that the engagement to deliver over the deeds, and in the meanwhile to hold them to the order of the plaintiff, deprived the plaintiff of his rights as *cestui que trust*. Whether Riches did or did not advance the £800 in 1870, does not appear, but it is certain that on the 31st of January, 1873, Dr. Kenny executed a mortgage of this same property, in which he acknowledged the receipt of £800, and agreed to pay interest at the rate of 5 per cent., and not 6 per cent. Now, pausing there, it appears to me that from the moment of the execution of that mortgage Riches was a trustee of it for the plaintiff to the extent of £500. It is said on behalf of the Union Bank that Riches himself or his trustee in bankruptcy could claim the £800 and deny the trust, and for that the authority *of *Middleton v. Pollock* (*) is cited. In that case money had been placed in the hands of Pollock by Wetherall, who had been informed by Pollock's clerk that he proposed to invest the money in property at Camden Town, and Pollock afterwards wrote

(¹) 10 H. L. C., 90.

(²) Law Rep., 4 Eq., 397.

(³) 1 J. & H., 721.

(⁴) 2 De G. & J., 21.

(⁵) Law Rep., 7 H. L., 496; 13 Eng. R., 20.

(⁶) 4 Ch. D., 49; 19 Eng. R., 658.

that the money was put out at 5 per cent., "as my clerk arranged with you." The Master of the Rolls directed that the plaintiff should be satisfied by further evidence that money had in fact been advanced to certain builders before the writing of the letters. It appears to me that that case does not decide what it has been said to decide. The only letter written was in general terms, and it said that the money had been advanced. If it had not been advanced, the property comprised in any subsequent security was not the property mentioned in the letter, and the petitioner would have failed to prove the identity, and the money would form part of the general estate. But it does not appear to me that in the present case Riches could have claimed the whole against the plaintiff.

If I am right in the conclusion I have come to, it is clear that the deposit with the Union Bank was a gross breach of trust; and it appears to me that the case is simply one in which, to use the language of Lord Justice Turner in *Cory v. Eyre* (*), the bank "are claiming priority over *cestuis que trust* under a breach of trust committed by their trustee." In cases of this sort it is familiar law that *qui prior est tempore potior est jure*. That priority no doubt may be displaced by showing negligence or fraud on the part of the mortgagee, who is earlier in time, or by showing a better equity on the part of the later mortgagee, but one or the other of those things must be shown.

Now, what circumstances of negligence or fraud are there in this case? On which ground does a posterior equity assert itself to be better? The only argument addressed to me on that point is this. It is said that it is negligence for a man to take a security in the name of another when there is no reason for doing so, and that Bradley ought not to have allowed the mortgage to be taken in the name of Riches, and ought either to have had an indorsement on the deed, or to have obtained possession of the title-deeds, and thereby have deprived Riches of the power of dealing in the way in which he has dealt. It appears to me that that argument [193] *is not only absolutely inconsistent with the decision in *Cory v. Eyre* (*), but also with the decision of the House of Lords in the *Shropshire Union Railway and Canal Company v. Reg.* (*). There the Lord Chancellor expressed in very emphatic language the right of every man to take a security in the name of another, and that a man having done so could not have negligence imputed to him for not watching his trustee.

(*) 1 D. J. & S., 149, 167.

(*) Law Rep., 7 H. L., 496, 507; 13 Eng. R., 20.

The next argument was that this principle did not apply here, as a portion of the fund was contributed by the trustee. In point of principle I cannot see any difference between the cases, for the mortgagee may be a trustee of the whole or of part of a fund, but that very circumstance occurred in *Cory v. Eyre*, and the Lord Justice Turner dismissed it from his consideration as creating no substantial difference. He says ('), "It was attempted on the part of the appellants to make some distinction in this case upon the ground that the mortgage is what is called a contributory mortgage, a mortgage in which several persons are beneficially interested, but I see no distinction which can be made upon this ground." I hold, therefore, that the principle of priority of time applies, and that there is nothing to displace it, and that the plaintiff's right to the £500 is prior to any right of the bank, and I make a declaration accordingly.

His Lordship further decided that the security would not be apportioned between the plaintiff and the bank, but that the plaintiff would have priority over the bank for the £500 and interest.

The case as between the plaintiff and Woodman was then heard.

Jonathan Riches, who died in 1843, by his will left considerable freehold and leasehold house property in Middlesex to his wife (since deceased) for life, and after her death to his two children, H. J. Riches above mentioned and Mrs. Woodman (since deceased), wife of the defendant Woodman. All his house property appeared to have been subject to mortgages, so that the legal estates *were outstand- [194 ing. In 1870 Riches obtained from the above mentioned plaintiff Bradley an advance of £1,000 on a house in Finchley Road, and £1,000 on two houses in Paddington, both parts of the estate of Jonathan Riches. In February, 1874, Riches obtained from Bradley a further advance of £3,000 consols, on the security of Riches' one-half of his father's estate. The securities were effected by the deposit of deeds, and by letters from Riches to Bradley.

Riches had acted as the solicitor of Woodman, but the accounts of Jonathan Riches' estate remaining unsettled and a balance being due from Riches to Woodman for money lent, Woodman, in 1874, employed Messrs. Awdry & Clarke as his solicitors, who had a correspondence on the subject with Riches, and pressure was put upon him. Ultimately, by an indenture of mortgage dated the 24th of May, 1876,

(1) 1 D. J. & S., 169.

expressed to be made in consideration of the sum of £4,400 due to Woodman in right of his wife, and of divers other sums of money paid by Bradley to and partly on account of Riches (the last mentioned sums, together with the said sum of £4,400, amounting to £10,490), Riches assigned to Woodman (with other property) all the interest of him, Riches, in the real and personal estate of his father, Jonathan Riches, to secure the aforesaid principal sum of £10,490 then due to Woodman, and interest thereon. This deed was registered in the Registry of Deeds in Middlesex.

Bradley now claimed priority for his securities over this mortgage, though registered, on the ground that in the preparation of the mortgage Riches had been the solicitor of Woodman, the mortgagee, who was therefore affected with notice of the securities to Bradley. Evidence was gone into on the question whether Riches did act as solicitor to Woodman in the preparation of the mortgage, the effect of which is stated in the judgment given below.

North, Q.C., and *Speed*, for the plaintiff, cited *Moore v. Culverhouse*⁽¹⁾, overruling *Wright v. Stanfield*⁽²⁾; *Nene v. Pennell*⁽³⁾; *Essex v. Baugh*⁽⁴⁾; *Le Neve v. Le Neve*⁽⁵⁾.

195] **Cookson, Q.C.*, and *Whitehorne*, for Woodman: The acts 7 Anne, c. 20, imposes a duty to register as against those who come afterwards, and if a man neglects that duty he must not complain if he is a loser. We have a registered deed, and in order to deprive us of the benefit of our diligence we must be clearly affected with notice: *Wyatt v. Barwell*⁽⁶⁾. The defendant denies that Riches was his solicitor in this matter, but even if it is held that he was the solicitor, the presumption of notice to the client may be rebutted: *Kennedy v. Green*⁽⁷⁾. Riches had every motive to conceal the previous mortgages, and the fact of his not having registered them shows that he had a fraudulent intention: *Waldy v. Gray*⁽⁸⁾; *Rolland v. Hart*⁽⁹⁾; *Atterbury v. Wallis*⁽¹⁰⁾. It is merely a presumption that a solicitor communicates everything to his client, and here the presumption is strongly the other way: *Hewitt v. Loosemore*⁽¹¹⁾; *Espin v. Pemberton*⁽¹²⁾; *Greenslade v. Dare*⁽¹³⁾; *Thompson v. Cartwright*⁽¹⁴⁾; *Perry v. Holl*⁽¹⁵⁾.

⁽¹⁾ 27 Beav., 639.

⁽²⁾ 27 Beav., 8.

⁽³⁾ 2 H. & M., 170.

⁽⁴⁾ 1 Y. & C. Ch., 620.

⁽⁵⁾ 3 Atk., 646.

⁽⁶⁾ 19 Ves., 435.

⁽⁷⁾ 3 My. & K., 699.

⁽⁸⁾ Law Rep., 20 Eq., 238; 13 Eng. R., 759.

⁽⁹⁾ Law Rep., 6 Ch., 678.

⁽¹⁰⁾ 8 D. M. & G., 454.

⁽¹¹⁾ 9 Hare, 449.

⁽¹²⁾ 3 De G. & J., 547.

⁽¹³⁾ 20 Beav., 284.

⁽¹⁴⁾ 2 D. J. & S., 10.

⁽¹⁵⁾ 2 D. F. & J., 38.

FRY, J., after stating the facts of the case, and the evidence as to the employment of Riches by Woodman as his solicitor in the preparation of the mortgage of the 24th of May, 1875, and coming to the conclusion on the pleadings and the evidence that Riches was the solicitor of Woodman in that particular business, continued :

I hold, therefore, as a matter of fact, that Riches was the solicitor of Woodman in the matter of the mortgage of May, 1875.

The question which then arises is this. Looking at the circumstances of the case, must I impute to Woodman the knowledge which Riches of course had of the prior charges of September, 1870, and February, 1874? Now, upon that the cases seem to me to lay down the rule clearly. You must, in the first place, look at what are the circumstances of the case as to knowledge. If the circumstances of the case are such as in the ordinary course of business between *solicitor and client they are, then the solicitor must [196 be assumed to have communicated the fact to his client, and the knowledge of the agent is, to use the language of Lord Chelmsford in *Espin v. Pemberton* (*), the imputed knowledge of the client. It appears to me to be clear that that presumption or imputation is a thing which the client cannot be allowed to rebut. If it could be rebutted, it was amply rebutted in *Le Neve v. Le Neve* (†). If it could be rebutted, the language of Lord Hatherley in *Rolland v. Hart* (‡) could not be upheld. His Lordship says: "The purchaser of an estate has, in ordinary cases, no personal knowledge of the title, but employs a solicitor, and can never be allowed to say that he knew nothing of some prior incumbrance, because he was not told of it by his solicitor. It cannot be left to the possibility or the impossibility of the man who seeks to affect you with notice being able to prove that your solicitor did his duty in communicating to you that which, according to the terms of your employment of him, was the very thing which you employed him to ascertain." Therefore, what I have to do is to look at the circumstances in order to see whether the presumption or imputation of knowledge arises.

Now, what are the circumstances? In the first place, Riches was the solicitor for Bradley, and owed Bradley this duty, either to register the mortgages of 1870 and 1874, or to tell any subsequent client of his own about to advance money upon the same property that those mortgages existed. In the next place, he was solicitor for Woodman in the mat-

(†) 3 De G. & J., 547.

(‡) 3 Atk., 646.

(§) Law Rep., 6 Ch., 678, 682.

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ter of the mortgage of 1875, and he was bound by his duty as solicitor to communicate anything and everything that was material for Woodman to know. It is said that Riches had an interest not to communicate, because it is possible that the transaction might have gone off, and he then would not have obtained the benefit which he did by that mortgage. But I will not lay down as a rule that where a solicitor owes a duty on the one side, and has an interest on the other side, the presumption arises that he follows his interest and not his duty. I shall, on the contrary, presume that in this case he performed his duty, even although it was against his interest. But I think that if the special [197] *circumstances of this case are looked at, the suggestion that the transaction would have failed if that intimation had been given does not arise; because it is perfectly plain that the mortgage of May, 1875, was taken as a *tabula in naufragio*. Riches being pressed by Woodman to furnish the accounts, and to pay the sums which were then due, was unable to do so, and thereupon the best security to be got was taken from him. Therefore, even supposing the presumption to be stronger than it is, I should not allow it to prevail in this case. But I desire to put my decision mainly upon his, that where there is an interest and a duty, I shall not presume that the solicitor will follow his interest and neglect his duty.

The result, therefore, is, that in my judgment there is nothing whatever to take the case out of the ordinary case of a solicitor being employed by a mortgagee to obtain a mortgage. Where he is so employed, the knowledge of the solicitor is the imputed knowledge of the client. Here the solicitor knew of the mortgages of 1870 and 1874, and therefore I impute that knowledge to the client. It appears to me that it is the case of *Le Neve v. Le Neve* ⁽¹⁾ over again.

I therefore hold that the mortgage of 1875 must be postponed to the mortgages of 1870 and 1874.

Solicitors for plaintiff: *Layton, Son & Lendon*.

Solicitors for Union Bank: *Burton, Yeates & Hart*.

Solicitors for Woodman: *Wood, Latham & Bigg*, agents for Awdry & Clarke, Chippenham.

(1) 3 Atk., 846.

[9 Chancery Division, 198.]

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[1876 P. 47.]

Stockbroker—Solicitor—Payment—Notice—Stock Exchange Rules.

Four executors holding stock in their name directed their solicitor to sell the stock. The solicitor, in the name of his firm, gave to a stockbroker whom the solicitor had employed in stock exchange speculations directions to sell the stock. The stock was sold by the broker, and the solicitor returned to the stockbroker transfers of the stock, with receipts indorsed, signed by the four executors. The sale was completed, and the stockbroker sent to the solicitor a check for part of the purchase-money for the shares, and carried the balance on the transaction to the credit of the solicitor in the account between them, which account was afterwards settled by a payment made to the stockbroker:

Held, that, under the circumstance, the stockbroker must be held to have had notice that the shares were not the property of the solicitor, and that, though the solicitor had from the executors authority to receive the purchase-money, payment to him, by giving him credit in an account between them, was not sufficient to discharge the stockbroker, who remained liable to the executors for the balance.

Bridges v. Garrett ⁽¹⁾ commented on.

The sale was made subject to the rules of the Stock Exchange, and the stockbroker alleged that by those rules the broker could recognize only the person employing him, and obey his directions as to the disposal of the proceeds of a sale:

Held, that the rules of the Stock Exchange applied only to the sale on the Stock Exchange, and not to subsequent transactions.

Held, also, that no such rule or custom was proved, and that no such rule or custom could be upheld.

ELIZA ANN PEARSON (then Eliza Ann Williams), E. B. Stephens, and C. Hill, as executors of J. F. Williams, held £3,700 Midland Railway Company stock and 111 preference shares in the same company, all in their names as such executors, in the books of the company.

The executors employed William Smith, a solicitor practising as Smith & Co. (either alone or in partnership with one Carter), in the business of the executorship, and in June, 1875, the plaintiffs, that is to say, the three executors and C. F. Pearson, who, on the 17th of June, 1875, was married to Eliza Ann Williams, requested *Smith & [199 Co. to have the Midland stock and shares sold; and Smith, in the name of Smith & Co., gave instructions to a stockbroker, G. W. Scott, to sell them. Smith had been in the habit of employing Scott in speculations on the Stock Exchange, and there were accounts and bi-monthly settlements between them; but the accounts in respect of these transactions seemed to have been kept in the name of William Smith, and not of Smith & Co. The stock and shares were sold on the 24th of June to one Jackson, and Scott sent to

(¹) Law Rep., 5 C. P., 451.

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Smith the usual sold note stating that the sale was on account of Smith & Co., and was subject to the rules of the Stock Exchange. Scott at the same time sent seven blank transfers and a letter stating that if the transfers were returned correctly signed the check would be forthcoming on Monday next. At this time Smith was under considerable liabilities to Scott on account of differences which were or might become payable. The plaintiffs duly signed the seven transfers, and also indorsed receipts for the purchase-moneys, and Smith on the 28th of June sent them to Scott with a letter saying: "We have made the transfers in the name of Mr. Pearson as well as Mrs. Pearson, because the secretary of the Midland Railway Company, in a letter we received from him, states that if the stock was sold he would require her husband to join in the transfer. The coupons of the £3,700 consolidated stock are in the hands of the secretary, as will be seen by the accompanying letter, in which you will observe he states that he will send them in the course of this week, so that if the certificates are sent down to him he will probably make them out now in the names of the purchasers of the stock direct."

On the 30th of June, Scott sent to Smith an account headed "Messrs. W. Smith & Co., in account with G. W. Scott," debiting himself with the net produce of the sales, amounting to £6,832 15s., after deducting commission and certain calls paid on the shares, and taking credit for a check for £3,500 and for two sums amounting to £3,332 15s. placed in the account "To credit of W. Smith." The check for £3,500 was on that day or the day before given to Carter on account of Smith & Co., and sums amounting to £3,332 15s. were carried by Scott in his accounts to the credit of Smith. Smith went abroad in August, 1875, ostensibly on business but checks passed between him, or 200] Carter in his name, and Scott; *and Scott carried on the account between them until the end of 1875, when it was settled and adjusted by the payment of £400 to Scott, and a new account was begun. Early in January, 1876, it was ascertained that Smith had absconded, and he had since been adjudicated bankrupt.

C. F. Pearson, Eliza Ann Pearson, Stephens, and Hill then brought an action against Scott for the produce of the sales, offering, in the statement of claim, to allow what had been paid in cash to Smith or for calls, claiming, in fact, the balance of £3,332 15s. which had been carried to the credit of Smith.

Scott, by his statement of defence, pleaded that he did

not know, and had no reason to believe, that the stock and shares were the property of the plaintiffs, or that Smith was was their agent and was not the principal; and pleaded that he had paid the whole of the purchase-money to Smith. Also that the whole of the transactions were subject to the rules and customs of the Stock Exchange, according to which a broker is bound only to recognize the person employing him, and to obey the direction of that person only as to the application and disposal of the proceeds of sale. The result of the evidence on this point is stated in the judgment of Mr. Justice Fry.

Cookson, Q.C., and *Blackmore*, for the plaintiffs, cited *Baring v. Corrie* (¹).

North, Q.C., and *Methold*, for the defendant: In *Baring v. Corrie* there was notice of agency; here there was none. *Borries v. Imperial Ottoman Bank* (²) shows what is the law as to means of knowledge. Actual knowledge is one thing, but a mere suspicion is quite different: *Ex parte Dixon* (³). The stockbroker dealt only with Smith, and there was nothing to show that he was not the absolute owner. But even if Scott knew that Smith was acting as solicitor for the plaintiffs, he was obliged to do as Smith directed, and Smith had a clear authority to receive payment: *Bridges v. Garrett* (⁴). Payment by giving credit in their account was quite sufficient: *Ferrao's Case* (⁵); *Spargo's Case* (⁶). If checks had been exchanged, [201 that would have been quite good, and what difference can it make that they did not go through that form. Whatever can be pleaded as payment is good payment to an agent: *Tomkins v. Saffery* (⁷); *Ex parte Cooke* (⁸). The plaintiffs ought not to have left their accounts with Smith & Co. unsettled for so long and then come upon the defendant. But, independently of the general law, the transaction was under the rules and customs of the Stock Exchange, and according to them the broker could recognize as his principal only the man who employed him, and was bound to deal with the money as he directed: *Sweeting v. Pearce* (⁹); *Nickalls v. Merry* (¹⁰).

Cookson, in reply: As to payment to an agent, cases like *Spargo's Case* have no application to the general law. For valid payment to an agent a mere arrangement between the

(¹) 2 B. & A., 137.

(²) Law Rep., 9 C. P., 38; 7 Eng. R., 138.

(³) 4 Ch. D., 133; 19 Eng. R., 724.

(⁴) Law Rep., 5 C. P., 451.

(⁵) Law Rep., 9 Ch., 355.

(⁶) Law Rep., 8 Ch., 407; 5 Eng. R., 626.

(⁷) 3 App. Cas., 213; 24 Eng. R., 138.

(⁸) 4 Ch. D., 123; 19 Eng. R., 714.

(⁹) 9 C. B. (N.S.), 534.

(¹⁰) Law Rep., 7 H. L., 530; 13 Eng. R., 55.

debtor and the agent will not do. If A. owes money to B., an arrangement between A. and B.'s agent that the money shall be considered as paid can never discharge A., and would not support a plea of payment; nor is it true that every form of payment which would support a plea of payment to an agent will discharge the debtor. The debtor must show that he had reason to believe that the money would reach the principal, and it is clear that in this case the defendant could not have thought so. The only reason why payment in cash or bills has been held good is, that there is a presumption that the agent will do his duty and hand the cash or bills to the principal.

FRY, J.: In this case the plaintiffs are the executors of Mr. John Fisher Williams, and they sue the defendant, who is a stockbroker, for the recovery of the balance of a sum of money received by him for the sale of certain stock and preference shares of the Midland Railway Company. It would be convenient, I think, before stating in detail the facts as they appear to me to be proved, to state the principal questions which arise.

202] *The first question is, whether the defendant had knowledge that the plaintiffs were the owners of the stock and shares in question, or had such notice as put him on inquiry whether they were the owners of the stock and shares so as to preclude him from saying that they were not the owners. The second question will be whether, assuming that he had knowledge of the interest of the plaintiffs, a Mr. Smith was so constituted the agent of the plaintiffs to receive the money from Mr. Scott, that the transaction on settlement which took place between Mr. Scott and Mr. Smith was a payment through their agent to the plaintiffs. Those are the principal questions.

Now with regard to the first question it will be necessary to consider the facts of the case. [His Lordship then stated the facts of the case, observing that the circumstance that the check was to be "forthcoming on Monday next" appeared to him to be not unimportant, as separating this transaction from the ordinary transactions for differences which at that very time Smith was carrying on to a large extent. For, notwithstanding the possibility or the probability that Smith might owe Scott on the settlement a considerable sum for differences, this transaction was to be completed separately. It had been suggested on the part of the plaintiffs that this was due to the knowledge that the stocks and shares did not belong to Smith, but belonged to his clients. It had been suggested, on the other hand, that

the check was to be forthcoming, because there was no reason why Mr. Scott should retain the moneys in order to pay for the future purchase of shares. It was not necessary to determine which of these two contingencies was the more probable. It was enough to say that, as it appeared to his Lordship, the transaction was by the common consent of both parties taken out of the ordinary course of dealing between them. Further, it appeared clear that, on the receipt of that letter of the 28th of June, and the transfers, Scott must have known that the plaintiffs had an interest of some description in these shares. They were the legal owners, and appeared as the proper persons to execute the transfers. The reference in the letter to the coupons would, in his Lordship's opinion, show that the plaintiffs were persons who were deriving title from somebody else. But whether that was so or not, nobody could read that letter and *look at [203 the transfers without seeing that the plaintiffs were then the registered proprietors, and at law the owners of these stocks and shares. There was certainly notice to this extent, that it put Scott on inquiry whether they were not the absolute owners. His Lordship then continued:]

A person who knows that the legal estate in land or in shares, or in any other property, is vested in A. B., cannot safely assume that the whole equity is in C. D. without making an inquiry of A. B. The case of *Baring v. Corrie* (1) bears strongly on this question. There Coles & Co. acted both as brokers and merchants, and Abbott, C.J., said that if the defendants "meant to deal with them as merchants, and to derive a benefit from so dealing with them, they ought to have inquired whether in this transaction they acted as brokers or not; but they made no inquiry. They had the name of the ship in which the goods had been imported, and they might have made inquiries into the circumstances of the case if they had not chosen to remain in ignorance. There is therefore a clear omission on their part, and they do not stand in a situation so completely free from blame as the plaintiffs do. There is another circumstance which shows that if they did not know that Coles & Co. were acting as brokers in this case, it was because they chose not to know it. It appears that they received a sale note, and were not required to sign a bought note." Now it appears to me that similar circumstances exist here. Smith was known to be a person who speculated in shares on his own account; he was known, also, to be a solicitor, that is to say, a person through whom instructions to sell the stock and shares in

(1) 2 B. & A., 137, 144.

the names of these four persons might be given, either because he was the solicitor of the owners, or because he was the equitable owner, and if the defendant chose to assume that Smith gave those instructions in the character of equitable owner, he ought to have made some inquiry if he wished to avoid liability. That being so, I hold that the shares having been in fact the property of the plaintiffs, and the defendant not having made inquiry, he cannot be heard to say that he dealt with Smith in any other character than as agent of the plaintiffs.

Then, what was the extent of Smith's agency for the plaintiffs? 204] tiffs? *It appears from the letter of the 28th of June that the transfers were sent by Smith & Co. to Scott on that day, and that the receipts on those transfers were signed by the plaintiffs. That would, in my judgment, import an authority in the person who was allowed to transmit these receipts himself to receive the money as money. The plaintiffs, in the statement of claim, say that as to such part as was paid in cash or in discharge of a call properly payable by the plaintiffs, they are willing to accept such payments as payments made to themselves or on their account. That appears to be a distinct admission that Smith & Co. were armed with authority from the plaintiffs to receive the purchase-money by an actual payment in cash, but no further. [His Lordship then stated the transactions of the 30th of June, and the result of the account then delivered, and continued:] Now, supposing that Smith had been the person absolutely entitled to the balances produced by the sale of the stock and the shares, there can, in my opinion, be no doubt that the transaction which then took place would have amounted, not to what is technically called set-off, but to a payment by Scott to Smith of so much of those sums as went to satisfy any debt due from Smith to Scott, and that the same would have taken place when subsequent differences accrued, and, therefore, in the result, when the differences were payable, the whole £3,332 15s., which on the 30th of June Scott owed to Smith, would have been deemed to have been paid by Scott to Smith.

But that gives rise to another question. Where A. owes money to C. and has dealings with B., who is an agent to collect money for C., it is not in dispute that A. must make actual payment in money to B. It is not suggested that A. can discharge himself by that which is technically a set-off, that is to say, a retainer, without the consent of the person against whom it is retained. It is not alleged that he can accept a release from the agent to whom he ought to pay it.

But it is said that anything which will amount to payment in law as between the principal and the agent is a good payment to the agent. That, however, appears to me to be a mixed question of fact and law. In the first place, the question must be asked, what was the authority of the agent? In this case I can find no authority going beyond an authority to *receive in money. In the next place, it appears [205 to me that a long series of cases has in effect laid down the proposition that the payer who knows he is paying an agent must pay in such a manner as to facilitate and encourage the agent to pay it to his principal—at any rate, that the payer cannot pay it to the agent by a settlement of account between himself and the agent. And for this short reason in morals, that the money which is paid to the agent ought to find its way to the principal, and that if you intercept that money in order to pay the debt which the agent owes to the payer, you diminish the probability of the money finding its way from the agent to the ultimate payee.

In consequence, however, of the recent decisions, it appears to me necessary to look at the cases. In *Todd v. Reid* (') the judgment is that "The broker, as agent of the assured, was only entitled to receive payment in money, and no usage can sanction such a practice as that which is stated to have prevailed in this particular business. This is, in fact, an attempt to pay the debt of one person with the money of another."

In *Bartlett v. Pentland* ('), an assured, who resided at Plymouth employed an insurance broker in London to recover a loss from the underwriters, and the latter adjusted the loss by setting off in account against it a debt due to them from the broker for premiums; and it appears to me that the transaction between the parties was one which might have been pleaded by way of payment. It was not set off, because it was the extinction of two debts by mutual agreement of the parties, which is payment, and therefore that case gave rise to a suggestion whether payment in that manner is payment to satisfy the obligation of the payer. And Lord Tenterden says: "An authority given by a principal to his agent to receive money cannot be construed into an authority not to receive money, but to allow the debtor to write off so much as may be due from the agent to him." That appears to me to be a distinct decision that it is not every mode of payment which will be good, but that the mode of payment must be one following the authority; and if the authority is to receive money in payment, then that

(') 4 B. & A., 210, 211.

(') 10 B. & C., 760, 769.

which would be pleadable as payment, but is not in fact payment in money, will not be enough. Mr. Justice Bayley puts 206] *it even more plainly (*): "If instead of making the payment in that way"—that was, by payment to the order of the principal—"they make the payment to the broker in a manner which gives the latter an opportunity of misapplying the money; then, as the broker was not authorized to receive payment in that way, it was done at the peril of the underwriters." Again he says: "As the company did not put Mitchell in the possession of money so as to give him an opportunity of transmitting that money to the principals, but merely wiped off a debt of their own, and paid, not by money, but by set-off"—that does not mean strictly legal set-off—"they did that which was not authorized by the plaintiffs." Mr. Justice Littledale puts it in this way (*), which is not unimportant: "The only question, therefore, is whether Mitchell had authority from the plaintiffs to settle the account with the underwriters in the way in which he has done. There certainly was no express authority given by the plaintiffs to Mitchell so to do, but that authority might be implied if there had been any course of dealing between the plaintiffs and the present underwriters and Mitchell in which losses had been set off in this manner against a debt due from the broker to the underwriters." In the present case it is clear that no express authority had been given to receive by way of set-off, and there is no suggestion that the course of dealing between the plaintiffs and Smith had resulted in that.

The case of *Barker v. Greenwood* (*) is not entirely unimportant, as showing that the law is well ascertained on this point. There Baron Alderson says: "An agent with a general authority like this is, as it seems to me, only bound to receive payment in such a way as thereby to put it in his power completely to discharge the duty he himself owes to his principal. If, therefore, he is bound to pay the whole over to the principal, he must receive it in cash from the debtor. And a person who pays such an agent, and who means to be safe, must see that the mode of payment does enable the agent to perform this his duty."

The case of *Scott v. Irving* (*) enforces the same general principle; and I only refer to it in order to say that a new expression seems to have been introduced into that case by 207] Mr. Justice Parke, *who said: "Mitchell, therefore, was the agent of the assured to receive payment from the

(*) 10 B. & C., 771, 772.

(*) 10 B. & C., 774.

(*) 2 Y. & C. Ex., 414, 419.

(*) 1 B. & Ad., 605, 614.

underwriters in cash, or that which was equivalent to payment in cash."

In *Sweeting v. Pearce* ⁽¹⁾ Mr. Justice Byles puts the principle of this class of cases with great clearness. He says: "It is not disputed that the general rule of law is that an authority to an agent to receive money implies that he is to receive it in cash. If the agent receives the money in cash the probability is that he will hand it over to his principal; but if he is to be allowed to receive it by means of a settlement of accounts between himself and the debtor, he might not be able to pay it over; at all events it would very much diminish the chance of the principal ever receiving it; and upon that principle it has been held that the agent as a general rule cannot receive payment in anything else but cash." Now that, it will be observed, is the precise point here, because the payment alleged is payment by settlement of accounts between the agent and the debtor. Mr. Justice Willes puts the same view in shorter language: "As a general rule, when a person employs an agent to receive a debt, the agent must receive it in money, and it is not sufficient that the debt should be written off against a debt due from such agent." That case went to the Exchequer Chamber ⁽²⁾, and was determined in the same way by that court.

The next case is *Bridges v. Garrett* ⁽³⁾, which has caused me very considerable anxiety lest I should not give due weight to the decision arrived at. There the plaintiff was as lord of the manor entitled to receive a fine, and the fine was paid to the deputy steward by a check drawn by the surrenderee on the surrenderor's bankers, crossed with the bankers of the deputy steward, and paid by the deputy steward into his own bank, to whom he owed money, and therefore, in effect, the surrenderee paid the debt to the lord by requesting a debtor to him to pay to a person to whom the deputy steward owed money a sum in diminution of the deputy steward's debt, that is what it comes to. It was held by the Court of Common Pleas that that was not a good payment, on the general principle which I have referred to. It was held by *the Court of Exchequer [208 Chamber ⁽⁴⁾], that it was a good payment. In that case the jury had found as a matter of fact that Craig, the deputy steward, had authority to receive the fine for the lord, and that a crossed check was a good payment to the lord within the authority to pay to Craig. They found, therefore, that the payment was actually within the authority, and the

⁽¹⁾ 7 C. B. (N.S.), 449, 485.

⁽²⁾ Law Rep., 4 C. P. 580.

⁽³⁾ 9 C. B. (N.S.), 534.

⁽⁴⁾ Law Rep., 5 C. P., 451.

short effect of the decision of the Court of Exchequer Chamber is, that they thought there was evidence for the jury, and refused to disturb their finding. They thought, moreover, that, seeing that the check given by the surrenderee was good, and that it was an ordinary course of business to make payments by check, it might be considered that that check so given, when cashed, became a payment of cash to the agent. It appears therefore to me that, in their opinion, that case came within the rule, and that the fact, which probably was unknown to all the parties at the time, that the deputy steward owed money to his bankers, was immaterial, and that the transaction therefore none the less remained a payment in cash. If I had considered that that case was intended to overrule the long current of decisions to which I have referred, I should have entirely yielded to it, but it appears to me that the court did not intend to do anything of the sort, and considered their decision consistent with the previous decisions.

I think, therefore, that the law still stands, as it certainly stood before that case, that a person who owes money to an agent, knowing him to be an agent, must pay in such a manner as to facilitate the agent in transmitting the money to his principal, and that the payer cannot pay that agent by a settlement of account in which the payer himself gets the benefit of the payment, as took place in this case. I therefore conclude that according to the common law the payment was not good.

But then it is said that, if that be so, the payment was nevertheless good in this case, because of a certain custom or rule of the Stock Exchange. Now, in the first place, I must inquire how far that custom would apply to the present case. It is quite true that the defendant has sworn that the whole of the transaction was made subject to the laws, rules, and customs of the London Stock Exchange, and it is quite 209] true that his clerk has *echoed the same language. But I cannot take statements of that sort as going beyond the written instrument which I find before me, and what I find is, that the sale was made subject to the rules of the Stock Exchange. Therefore, undoubtedly, Scott would perform his duty and Smith would perform his duty if the contract was carried into effect as between vendor and purchaser according to the rules of the Stock Exchange, and those rules would govern the performance of the contract. But the question I have to consider is not one between the parties dealing on the Stock Exchange, but one between Scott after the transaction was completed on the Stock Exchange, and

the principal who gave him authority to buy, and the persons who instructed that principal. I hold it not necessary for the performance of that contract that the mode of payment by the broker should be subject to the rules of the Stock Exchange.

The next inquiry is, what is the rule or custom so set up? Scott appeared to think that such a rule as that you may in effect set off the debt due to the agent as agent against a debt due from the agent in his personal character is to be found in the printed book. It is not now contended that any such rule is to be found in the printed book, but then there is the evidence of Mr. P. Smith, who says that, "according to the customs of the London Stock Exchange, a broker is bound only to recognize the person actually employing and instructing him to sell or purchase stocks or shares, and to obey the directions of that person only as to the mode of payment and as to the application and disposal of the proceeds of sale, and it is the invariable custom for the broker to recognize only the instructions and directions of such person actually employing him,—that person is alone his principal." Then he says that the broker acts on that custom; and he winds up by saying, "The broker thus, as to his receipts and payments for such principal, acts in the same way as a London banker would act for his customer." Now observe what the custom set up is. It is that the broker, knowing the money which he owes to A. to be really the money of B., may stop that money in order to pay a debt due to himself, the broker, from A. personally—in other words, it is a custom to pay one man's debt out of another man's money. In the first place, I do not think such a custom could possibly be *upheld as reasonable, [210] and I think the cases of *Scott v. Irving* (*), *Sweeting v. Pearce* (*), *Ex parte Cooke* (*), and *Tomkins v. Saffery* (*), all tend to show that that custom could not be upheld. I will refer to one passage, and one passage only, in the judgment of the Exchequer Chamber in the case of *Sweeting v. Pearce*, where Mr. Justice Crompton said: "It seems to me that the usage contended for here, which permits the underwriter to set off the loss in account with the broker and so to discharge himself from the claim of the principal, though the latter is ignorant of the custom, is unreasonable." Here, too, there is no attempt to show that the plaintiffs had any knowledge of this alleged custom, and I hold that in the absence of such knowledge such a custom

(1) 1 B. & Ad., 605.

(2) 9 C. B. (N.S.), 534.

(3) 4 Ch. D., 123; 19 Eng. R., 714.

(4) 3 App. Cas., 213; 24 Eng. R., 138.

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is unreasonable. Further than that, this observation must be made. The witness Smith says that the broker is exactly in the same position in his dealings with his principal as a London banker would be in his dealings with his customer. But the cases of *Pennell v. Hurley* ⁽¹⁾ and *Bodenham v. Hoskyns* ⁽²⁾ have shown that a London banker has no such right as it is here said the broker has. In *Pennell v. Hurley* the Vice-Chancellor Knight Bruce puts the case with that brevity and clearness which is usual to him. It was a case in which a banker sought to apply money belonging to A., as trustee, to pay the debt of A. due from himself personally to the banker. His honor said this "Money is due from A. to B. in trust for C. B. is indebted to A. on his own account. A., with knowledge of the trust, concurs with B. in setting one debt against the other, which is done without C.'s consent. Can it be a question in equity whether such a transaction can stand? There is nothing more in the case than that." The banker, therefore, has not the right which Scott seems to think he has, and the witness Smith saying that the right of a broker is equivalent to that of a banker, it follows that the broker has no such right as is here set up. That, therefore, can make no difference in the case.

One other point remains for consideration. It is said in this case that I ought not to give immediate judgment for the 211] whole *£3,332 15s. which Scott attempted to settle in account with Smith, and for this reason, that there were other checks subsequently paid by Scott to Smith, and that there were undoubtedly payments by Smith to the plaintiffs. But it appears to me, on the evidence, that the plaintiffs have distinctly shown that no part of the £3,332 15s. ever reached their hands from Smith. They might have been cross-examined on it. They have not been. In fact, what they say is this: "We never have received the £3,500 for which we have given credit, still less have we received any portion of the £3,332 15s." I think that circumstance in itself would preclude the defendant from requiring an account to be taken between Smith and the plaintiffs. But further than that, it appears, as far as the accounts are in evidence before me, that there was no distinct payment made by Scott to Smith for the purpose of payment to the plaintiffs, and I think, according to the case of *Bartlett v. Pentland* ⁽³⁾, and the decision there given with regard to a particular sum of £200, it would be necessary for the payments to have been so made in order for Scott to avail himself of them as payments to Smith, having regard to the

⁽¹⁾ 2 Coll., 241.⁽²⁾ 2 D. M. & G., 903.⁽³⁾ 10 B & C., 760.

settlement come to in June. I think, therefore, there must be an immediate judgment for the whole amount of £3,332 15s., which was attempted to be dealt with by the settlement on the 30th of June.

I must of course give the plaintiffs the costs of the action.

Solicitors for plaintiffs: *Cowdell, Grundy & Browne.*

Solicitor for defendant: *F. Rolt.*

See 12 Eng. Rep., 146 note; 22 Eng. Rep., 505 note; 11 Abb. Pr. Rep., 74-7 note.

An agent to sell has no authority to sell except for cash: *Lumpkin v. Wilson*, 5 Heisk. (Tenn.), 555; *Brown v. Smith*, 67 N. C., 245.

Where a committee were authorized, by vote of a school district, to sell a school house, a sale thereof on credit instead of for cash is void unless ratified by the district afterwards: *School District v. Aetna*, etc., 62 Maine, 830.

A. authorized his agent to sell his estate for £500 cash, and the agent instead of receiving cash accepted bills from the vendee, drawn on his, the vendee's, agent in Europe, which bills the agent applied to his own use by transmitting them to his correspondents, to whom he was largely indebted, and who placed the proceeds, when honored, to his credit. Held, reversing the decision of his honor the vice-chancellor, that A. was not bound by such acts of his agent, that this was not a payment to A., and that until he received the amount of the purchase-money in cash, he was not bound to execute a deed of the premises: *Brown v. Smart*, 1 U. C. Err. and App., 148.

An auctioneer who is authorized to sell goods on the conditions that purchasers shall pay a deposit at once, and the remainder of the purchase-money to the auctioneer on or before delivery of the goods, has no authority to receive payment by a bill of exchange; and such payment will not discharge the purchaser: *Williams v. Evans*, L. R., 1 Q. B., 352.

A clerk and salesman in the employment of a retail dry goods dealer is not authorized, as such, in the absence of his employer, to deliver goods in payment of, or as security for, a note signed by his employer, and if he do so without authority, either express or implied, from his employer, the assignee in insolvency of the latter, sub-

sequently appointed, may maintain an action for the goods so delivered: *Nash v. Drew*, 5 Cush., 422.

If an agent to sell goods deliver them without payment, the owner may sue the person to whom they are so delivered in trover: *Kingman v. Hotelling*, 25 Wend., 423; *Riley v. Wheeler*, 44 Verm., 199; *Brown v. Smart*, 1 U. C. Err. and App., 148.

A factor cannot bind his principal by a disposition of his property in any other way than by sale in the usual course of trade.

When the attempted transfer of property by an agent is made in a manner not within the scope of the authority confided to him, or with which the agent is not apparently clothed, no title passes, and the property may be reclaimed by the owner. So when the purchaser gives to the agent his check for a part of the price, with a full knowledge that the agent designs to use the same for his own private benefit, the principal is not bound thereby: *Easton v. Clark*, 35 N. Y., 225.

If a man being indebted to his own agent authorize the agent to receive money due to him from his debtor, intending that the agent should thereon pay himself his own debt, he thereby gives the agent an implied authority to receive payment to the extent of his own debt in any manner he may think fit; consequently the amount of the agent's own debt may be written off in account between him and the debtor: *Barker v. Greenwood*, 2 Younge & C., 414.

An agent authorized to collect a claim has no authority to sell it, so that a third person can seize upon and collect it in his own name: *Garrique v. Loescher*, 3 Bosw., 578.

If the owner of an article of personal property delivers it to an agent to sell, the latter has no right to deliver it to his creditor in payment of his own

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debt: *Rodick v. Coburn*, 68 Maine, 170; *Stewart v. Woodward*, 50 Verm., 78.

And if he do so, the owner may maintain trover against the creditor without a previous demand: *Rodick v. Coburn*, 68 Maine, 170.

Where the plaintiff's agent traded a lot of whisky for a piano, with the defendant, upon condition that his principal should approve the bargain, and delivered possession of a part of the whisky, and the principal repudiated the exchange, and demanded the whisky of the defendant, which he refused to deliver, claiming that the exchange was an absolute one; held that the plaintiff might maintain trover for the same.

When an agent exchanges the property of his principal without authority, the fact of his liability to the principal will afford no ground for defeating an action of trover brought by the principal against the party receiving the same from the agent, or release his liability to the owner after his refusal to deliver the same on demand.

The fact that the principal of an agent to collect claims had on two prior occasions sanctioned payments of the latter, in a pipe and in a watch and chain, by charging the same to the agent's account, will not bind the principal to a sale of his property for a piano, made without authority, especially when the principal repudiated it on the next day and as soon as advised of it: *Bertholf v. Quinlan*, 68 Ills., 298.

Authority to an agent to pawn a watch, does not authorize him to waive notice to the owner of sale in case of default; he has no authority except to consent to a sale in the ordinary mode: *Van Arsdale v. Joiner*, 44 Geo., 173.

Where the terms of a sale by auction require a cash payment, the auctioneer has no authority to receive as payment a check upon a bank, in which the drawer has at the time no funds; and the vendor is not bound by the act of the auctioneer, though he omits to notify the vendee that he repudiates it: *Broughton v. Silloway*, 114 Mass., 71.

An agreement between the agent of an insurance company and an applicant for insurance, whereby the former, without authority from the company, accepted, by way of satisfaction of a premium payable in money, articles of personal property, is a fraud upon the

company, and no valid contract against it arises therefrom: *Hoffman v. John Hancock*, etc., 92 U. S. Rep., 161.

Where an agent having a sum of money in his hands belonging to his principal, is directed to remit it by purchasing and forwarding a bill of exchange, he should purchase the bill with such money and not by using his own credit. If he do the latter, such a bill will not, without payment thereof, discharge his liability to his principal: *Hayes v. Stone*, 7 Hill, 128, affirmed 8 Den., 575.

A party dealing with an agent for a special purpose must ascertain, at his own peril, the agent's power. And where an agent's contract to sell land at a fixed price has been approved by the principal, the purchaser has no right to infer from that fact that the agent has power to alter the terms of the contract: *National Iron Armory Co. v. Burner*, 19 N. J. Eq., 331.

The plaintiff, an auctioneer, was employed by W. to sell certain goods by auction. W. was indebted to the defendant in £60, and before the sale it was agreed between W. and the defendant that any goods the defendant might buy at the auction should go in payment of his claim against W. The plaintiff had no notice of this agreement at the time of the sale. The defendant bought several lots, to the amount of £40, and the plaintiff allowed him to take them away on the faith of his paying for them; but the defendant supposed that he was taking them in pursuance of the agreement with W. The day after the sale the plaintiff paid W. £90, on account of the sale. Afterwards the defendant informed the plaintiff of the agreement between the defendant and W.; and after this notice the plaintiff, on the demand of W., paid over to him the balance due on the sale, about £100, after deducting his, the plaintiff's, commission and charges as auctioneer. The plaintiff then sued the defendant in the county court for the amount of his purchases at the sale:

Held, that the defendant was entitled to the verdict. By the terms of the original agreement between the defendant and W., before the sale, the defendant was entitled to have the goods without payment, and the plaintiff's charges in respect of the goods had

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been satisfied before action. The plaintiff, therefore (if he had not already paid over the amount), would have been bound to pay over the whole proceeds recovered in this action to W., who, by the agreement, was not entitled to anything.

The facts, therefore, which showed that W. would not be entitled to recover, established a defence to the action by the plaintiff. The fact that the plaintiff gave up the goods on the faith of the defendant paying for them, created no liability in the latter, as he had been guilty of no deceit, and there were no facts beyond the mere receipt of the goods from which a promise on the part of the defendant to pay could be inferred. And the fact that the plaintiff had paid over to W. the price of the goods could not affect the defendant's rights, as the plaintiff had then had notice of the agreement between W. and the defendant: *Grice v. Kenrick*, L. R., 5 Q. B., 340.

An agent having authority to receive payment can only receive cash: *Sykes v. Giles*, 5 Mees. & Welsb., 645; *Todd v. Reid*, 4 Barn. & Ald., 210; *Barker v. Greenwood*, 2 Y. & C. Exch. Eq., 414; *Wiley v. Mahood*, 10 W. Va., 206.

A power of attorney giving authority to demand, sue for and recover a debt due the principal, with full power to execute sufficient releases and discharges, gives no authority to the attorney to release the debt without satisfaction, or to satisfy a judgment obtained upon the debt, without actual payment; the power is restricted to the accomplishment of the purposes of the agency: *De Mets v. Dagron*, 53 N. Y., 635.

A policy delivered to an insurance broker for the purpose of settling a loss is adjusted by the underwriter, payable at a month. The broker charges the underwriter in account for the loss and transmits to the assured an account, in which he states himself to be debtor for the amount of the loss, and for the balance of that account the assured draws a bill upon the broker, which the latter accepts but does not pay. The underwriter's name never having been struck off the policy, it was held that he was not discharged: *Russel v. Bangley*, 4 B. & Ald., 395.

A custom to set off against an insurance loss a general balance due from a

broker to the underwriter, in the settlement of a particular loss, is illegal: *Todd v. Reid*, 4 Barn. & Ald., 210.

See *Alderson*, Baron, in *Stewart v. Aberdeen*, 4 M. & W., 222.

The holder of a note, if an agent or attorney, has no right to receive in payment anything except money, unless especially authorized so to do by his principal or client.

D., owing D., B. & H. gave them his note, and, as collateral security therefor, the note of B., which was secured by a policy of insurance. The building covered by the policy having burned, the company gave the attorney of D., B. & H. a draft to pay the amount of the insurance, which by the insolvency of the company became worthless. The attorney was not authorized by his client to receive the draft. Held, that it did not amount to a payment upon the note of B., and that D. was liable for the full amount of his note: *Drain v. Doggett*, 41 Iowa, 682.

An agent, to collect the purchase price of a chattel, has no power to extend the time of payment of the balance on receiving part payment: *Hutchings v. Munger*, 41 N. Y., 155.

An agent for the collection of a debt cannot lawfully accept, in discharge thereof, his own individual obligation to the debtor, unless authorized to do so by his principal.

And even if the agent be specially empowered to compromise, and accept personal property in satisfaction of money demands, this will not authorize him to extinguish a debt due the principal by setting off against it his own debt: *McCormick v. Keith*, 8 Neb., 143.

And if such agent receive a note or bill it is not, as against the principal, without ratification, a valid payment: *Sykes v. Giles*, 5 M. & W., 645; *Hart v. Hudson*, 6 Duer, 294.

In Tennessee it is held, that where a constable, having charge of a judgment rendered by a justice of the peace, accepted as a credit thereon the promise of a third party to pay for the judgment debtor \$225, which was paid, as promised, to the constable but was not paid over by him, that the payment was good: *Cain v. Bryant*, 12 Heisk. (Tenn.), 45, distinguishing *Cooney v. Wade*, 4 Humph., 444.

Promissory notes taken by R. as con-

signee and factor in payment for goods of his principals, sold by him, were delivered by the former to C., to enable him to get them discounted for R. A bill being filed by the principals against R. for an account of the goods sold by him, and praying for an injunction and a receiver, and against C. to reach the notes so delivered to him by R. or their proceeds, and with knowledge that they belonged to the plaintiffs; held that a possession unaccompanied by ownership being first shown to C., in order to protect himself as a *bona fide* purchaser, he was bound to prove that he paid value for the notes. And that a mere allegation by his administrator, upon information and belief, that C. subsequently discounted them himself, was not sufficient.

One receiving negotiable notes or bills before maturity from a factor as his agent or bailee cannot, as against the factor's principal, rely upon his possession of the securities alone as evidence that he is a *bona fide* holder for value: *Micklethwaite v. Thebaud*, 4 Sandf., 97.

The power of an agent to sell, implies the power to receive payment, unless the purchaser had notice that the agent had authority from his principal to sell only: *Collins v. Newton*, 7 Baxter (Tenn.), 269; *Heiskell v. Johnson*, 5 Sneed, 469.

An agent intrusted with goods, with power to sell them, has power to receive payment therefor though not paid until subsequently: *Rice v. Groffman*, 56 Mo., 434; *Copee v. Thornton*, 3 Car. & P., 352; *Story on Agency*, § 102; *Lumley v. Corbett*, 18 Cal., 494; *Sumner v. Saunders*, 51 Mo., 89; *Brooks v. Jamison*, 55 Mo., 505.

Where a person selling machines for a company is permitted to transact business in its behalf, with the knowledge of its controlling representatives, in such a manner that he is held out as an agent with general powers, the purchaser will be protected in subsequent payments made to him: *Howe, etc., v. Ballweg*, 89 Ills., 318; *Rice v. Groffman*, 56 Mo., 434.

Authority in an agent to sell goods upon a credit, does not show an authority in him to receive money in payment; and unless the principal has held such agent out to another as having author-

ity to collect, a payment to him is not good: *Clark v. Smith*, 88 Ills., 298.

An agent who sells by sample and on credit, and is not intrusted with the goods to be sold, has no implied authority to receive payment: *Butler v. Dorman*, 68 Mo., 298, distinguishing *Rice v. Groffman*, 56 Mo., 434.

An agent employed to make sales on credit is not authorized subsequently to collect the price in the name of his principal, and a payment to him will not discharge the purchaser, except on proof of some authority to the agent other than that necessarily implied in the power to make sales: *Seiple v. Irwin*, 30 Penn. St., 513.

Where a bill of goods is sent to the purchaser by the vendors upon an order procured by an agent of the latter, together with a bill thereof in the name of such vendors, payment to such agent in the absence of any proof of authority in the agent to collect, or of any prior dealings between the purchaser and the vendors, such as to lead the former to believe the agent had such authority, is no defence to an action by the vendors for the price of such goods.

In such action, a charge to the jury that the plaintiffs' sending the goods on the agent's order, authorized the defendant to assume that the agent was empowered to receive payment, was erroneous. The purchaser was bound to ascertain the agent's powers, and, in the absence of actual authority, the agent's statement that he had authority was not binding upon the principals. The purchaser had no right to act on anything that did not proceed from the principals, either as actual authority or in some form of binding admission: *Kornemann v. Monaghan*, 24 Mich., 38.

Where an agent, as he sold goods, deposited the money with the defendants, because he had no bank account, as he would want to use it, he reserved the right to draw it as he had occasion. There being no direction given that this money should be paid by the agent to the defendants; held, the latter were justified in taking it as a special deposit, and in paying back that deposit to him, as he from time to time required. That the defendants were under no obligation to hold it for the plaintiffs; and, to the amount of money so received, they were entitled

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to be credited for an equal amount expended. But that for any advance made, beyond such deposits, and the sums specially ordered to be paid to the agent, there was no authority for the advance, and the same should be disallowed: *Tucker v. Woolsey*, 64 Barb., 142, 6 Lans., 482.

Payments made to an agent are good and obligatory upon the principal, in all cases where the agent is authorized to receive payment, either by express authority or by that resulting from the usage of trade or from the particular dealings between the parties.

Where a person procured a loan of money from a party living some distance away in the country, on deed of trust security, taking one of the notes payable to himself and fixed the terms of the loan, and the proof showed that such person for a number of years was the general agent of the lender in the city to loan and collect moneys for him, and that such person furnished him with statements of moneys received on his account and reinvested or paid to him, and that several of the payments made by the borrower had been paid to him by such agent, and various payments of interest after the maturity of the debt; it was held, that the principal was bound by subsequent payments made to such agent, without notice given by him to the borrower not to pay to him.

The authority of an agent being limited to a particular business does not make it special; it may be as general in regard to that as if its range was unlimited.

The act of a general agent, or one whom a man puts in his place to transact all his business of a particular kind, will bind the principal so long as the agent keeps within the scope of his authority, though he may act contrary to his private instructions: *Noble v. Nugent*, 89 Ills., 522.

G. having failed in the butchering business, his brother H. bought out the business, and authorized G. to carry it on in his name. H. told E., of whom G. had been in the habit of purchasing cattle for the business, that as he was carrying on the business, he would be responsible for all cattle sold to G. It was necessary, and had been customary, to give notes for cattle pur-

chased. G. signed the name of H. to notes given to E., for cattle, which defendant R. indorsed, upon the representation of E. that H. had signed them. Defendant knew the facts as to method of conducting the business, and had indorsed a large number of notes signed in the same way. In an action upon the notes, held that the facts authorized an inference that G. had authority to sign notes in the name of H., and so justified a finding that the notes were made by H.: *Turner v. Keller*, 66 N. Y., 66.

When one employs an attorney to loan money for him, and to take a bond and mortgage from the borrower, and after the loan is made he intrusts the attorney with the possession of the bond and mortgage, and permits him to receive payments upon it, from time to time, and to indorse them for the mortgagee until payments are made which extinguish the principal, the attorney will be held to be in fact and in law authorized to receive the latter as well as the former payments, and in case of his omission to pay over the money to his principal, any loss consequent upon his insolvency must fall upon the mortgagee rather than upon the mortgagor: *Hatfield v. Reynolds*, 34 Barb., 612.

Payment to a son of an agent is not valid, and the promise of the agent to allow such a payment does not bind the principal: *Lewis v. Ingersoll*, 8 Abb. Dec., 85.

As to the power of an attorney to bind his client, see 12 Eng. Rep., 146 note; 22 Eng. Rep., 505 note; 11 Abb. Pr. Rep., 74-7 note; 8 Forum, 610-631; 1 Abb. New Cases, 315 note.

If an attorney appear for a party, the law presumes he had authority to do so from such party: *Fisher v. March*, 26 Gratt. (Va.), 765; *Ealey v. People*, 28 Kans., 510.

A party for whom an attorney appeared may show such appearance was without his authority, and if jurisdiction depend upon such an appearance, the proceeding is without jurisdiction: *Ferguson v. Crawford*, 70 N. Y., 253; *Ormsby v. Jacques*, 12 Hun, 443, distinguishing *Brown v. Nichols*, 42 N. Y., 126; *Gilman v. Gilman*, 126 Mass., 26; *Bowler v. Hutson*, 30 Gratt. (Va.), 266, 7 Reporter, 92; *Spier v.*

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Corll, 83 Ohio St. R., 236; Fordyce v. Marks, 1 Am. Law Rec., 257, 2 id., 392, Superior Court, Cincinnati.

See, however, Dossy v. West, 8 Daly, 298; 22 Alb. L. J., 244; Lipes v. Whitney, 30 Ohio St. R., 69.

So where jurisdiction depends upon the authority of one assuming to act as agent, there is no jurisdiction if he had no authority: Brinkman v. Shaffer, 23 Kans., 528.

Brown, Hall and Vanderpoel, being authorized to appear for the defendant in all actions regularly commenced against him, and none other, appeared as attorneys for him in this case, believing, at the time they did so, that the summons had been personally served upon him, while in fact it had not; the defendant did not know of an appearance until after the service of the complaint; on the application of the defendant, an order was made permitting him to withdraw the notice of appearance; held, that this was proper: Hunt v. Brennan, 1 Hun, 213.

After the dissolution of a partnership, one partner has no authority to employ an attorney for the other, or to authorize one to appear for him: Hall v. Lanning, 91 U. S. R., 160, 8 Chic. Leg. News, 145; Bowler v. Hutson, 30 Gratt. (Va.), 206; 13 Am. Dec., 726 note.

In Marks v. Fordyce, 2 Am. Law Rec., 392, it was held, by the superior court of Cincinnati, that after the dissolution of a firm one member could commence a suit, in the name of all the members thereof, to recover a firm indebtedness, and that all the members, though not assenting to such suit, were bound thereby.

Where a plaintiff, without serving a defendant, accepts the appearance of an unauthorized attorney for the defendant, the court will set aside the proceedings as irregular, although it is not shown that the attorney is insolvent: Massey v. Rapelje, 5 U. C. Com. Pl., 134.

A judgment rendered in another state, when sued on here, can be impeached only on the ground that the adjudging court did not have jurisdiction over the person of the defendant, or the subject-matter. If the defendant was present in the foreign state when proceedings were begun, and process was served upon him, no irreg-

ularity in such service, unless such as deprived it of all citatory effect, can be set up against the judgment ensuing thereon in a suit on such judgment in this state: Jardine v. Reschert, 39 N. J. Law, 165.

Defendant pleaded that he was not at any time served with any process issuing out of the said court, at the suit of the plaintiffs, for the cause of action for which the said judgment was obtained; nor had he at any time notice of any such process; nor did he appear in the said court to answer the said plaintiffs; held bad on demurrer, inasmuch as the pleading did not show that the proceedings were so conducted as to deprive the defendant of the opportunity of defending himself: Montreal Mining Company v. Cuthbertson, 9 U. C. Q. B., 78.

The entry of the satisfaction of judgment on the record of the court will not be set aside, where such satisfaction was entered, pending a writ of error to the supreme court in behalf of the defendant, upon part payment of the judgment, under a compromise with the duly authorized attorneys of the plaintiff, although such entry of satisfaction was not made in open court, and the original plaintiff had died pending such compromise, and the authority of the attorneys had not been ratified by the administrator *de bonis non*: Jeffries v. Union Mut. Life Ins. Co., 1 Fed. Rep., 450.

The acceptance of service of the notice of the time and place of meeting of arbitrators, by the attorney of the opposite party, is not sufficient to give arbitrators jurisdiction; service must be on the opposite party personally if a resident of the county.

If the attorney of the opposite party in terms waives service of the notice on his clients, it is sufficient: Merse-reau v. Kohler, 2 Penn., 98, following Henry v. Norwood, 4 Watts, 347.

An attorney is not authorized by his retainer to satisfy a judgment without payment, or to compromise or release the same; nor can he settle a suit and conclude his client in relation to the subject in litigation without consent of the latter: Mandeville v. Reynolds, 68 N. Y., 528; Pickett v. Merchants, etc., 32 Ark., 346; Levi v. Brown, 56 Miss., 83; Preston v. Hill, 50 Cal., 43.

See Laleski v. Boyd, 32 Ark., 74.

An attorney at law employed to collect a debt may receive payment thereof in money, but has no right to accept anything else in satisfaction without express authority from his client; and if he does, it will be no payment unless ratified or assented to by his client: *Wiley v. Mahood*, 10 W. Va., 206, 221.

An attorney employed to collect a debt cannot give the debtor an acquittance of the claim by receiving payment thereof in a debt he, the attorney, owes the debtor: *Wiley v. Mahood*, 10 W. Va., 206; *Chapman v. Burt*, 77 Ills., 337.

An attorney, with whom a mortgage over due is intrusted "to be foreclosed," is not authorized to receive notes for its payment, payable at a future day, nor is he authorized to extend the payment. The payment of such notes to the attorney, who misapplies the proceeds, is not a payment on the mortgage: *Heyman v. Beringer*, 1 Abb. New Cas., 315; *Wiley v. Mahood*, 10 W. Va., 206.

In New York it has been held, that an attorney, under his general authority to collect a note, is authorized to receive a payment of part in money and the residue in a note, for a short period, of a person of undoubted responsibility: *Livingston v. Radcliff*, 6 Barb., 201.

An attorney's authority under his simple retainer should be held, as between the plaintiff and defendant, not to allow him to satisfy the judgment, except upon actual payment in money of the full amount.

The attorney for the plaintiff in this case, and the defendant, both acting in good faith, as to the supposed authority of the attorney, under his general retainer, to receive payment and discharge the judgment by a satisfaction piece within two years from the entry of judgment, settled the judgment in this shape:

The attorney made an agreement with the defendant, under which the defendant delivered to the attorney a quantity of liquors, amounting, as they valued them, to a large portion of the judgment, and paid the balance of the judgment in money, and the attorney executed and acknowledged a satisfaction piece of the judgment, as upon payment in full, upon which the judgment was discharged of record.

The attorney immediately shipped the liquors to the plaintiff, at his residence in another state; but the plaintiff refused to receive them, and repudiated the arrangement as unauthorized; and (as is too frequently the case) the attorney being insolvent, the plaintiff moved to vacate the satisfaction of the judgment, which was granted: *Lewis v. Woodruff*, 15 How. Pr., 539.

When a trustee, who has trust funds invested in a mortgage, which is not yet due, being summoned as defendant in a suit brought by another incumbrancer for the sale of the mortgaged premises, employs an attorney to represent him in the suit, and for that purpose delivers the note and mortgage to the attorney, and the attorney gives back a receipt, "received for collection," etc., the attorney is not thereby authorized to make a voluntary settlement of the mortgage before maturity. If such attorney represent to a third party, who is acquainted with him and trusts him, that he has authority to cancel the mortgage, and that he has the note and mortgage in his possession for that purpose; and thereupon such third party, having faith in the representation, gives the attorney money to pay the principal and interest accrued, and the attorney appropriates the money, the loss is the loss of such third party, not of the mortgagee: *Hulbert v. Nolte*, 6 Am. Law Record, 246 (Supr. Ct., Cinn.).

The solicitor of a party has not, as such, any authority to enter into a contract for the sale of his client's lands: *Cameron v. Book*, 15 Grant's (U.C.) Chy., 693.

A payment to an attorney of the *prochein ami* of an infant plaintiff is good: *Baltimore, etc., v. Fitz Patrick*, 31 Md., 619.

It is a clear breach of duty for a sheriff, in any case, to suffer the attorney of the plaintiff to take into his hands the proceeds of a sale, and to deal with and dispose of them at his pleasure, and at the time most suitable to his convenience. If he do so, on a sale in partition, he is liable to parties other than the client of the attorney entitled to a share of the proceeds for their shares: *Van Tassell v. Van Tassell*, 31 Barb., 439.

In *Minnesota* it is held that the au-

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thority of an attorney, implied in his retainer to prosecute or defend an action, ceases upon the entry of judgment against his client: *Berthold v. Fox*, 21 Minn., 51.

The authority of an attorney who has obtained a judgment for his client continues in force until the judgment is satisfied.

Payment to the attorney is payment to his client, and will protect the officer against a suit by the latter for not enforcing the execution.

To constitute a revocation of the attorney's authority, notice must be given. The opposite party, and all others interested, have a right to presume that his authority continues until notified to the contrary: *White v. Johnson*, 67 Maine, 287.

The authority of an attorney employed to prosecute or defend an action, in the absence of special circumstances, continues by virtue of the original retainer until its final determination; the contract is single; no right of action accrues to him, and the statute of limitations does not begin to run against his claim for services until his relation as attorney to the suit is ended: *Bathgate v. Haskin*, 59 N. Y., 533.

An attorney employed to collect a claim has authority by virtue of his original retainer, after he obtains judgment, to institute supplementary proceedings thereon, and to procure the appointment of a receiver; these are proceedings in the suit. But it seems he has not authority, by virtue of such retainer, to commence an action in the name of the receiver against a third person, to set aside as fraudulent a conveyance from the judgment debtor: *Ward v. Roy*, 69 N. Y., 96.

If client die, attorney cannot institute supplementary proceedings: *Amoré v. La Mothe*, 5 Abb. N. C., 146.

A client is not to be regarded as having the right to govern the conduct of his attorney as to the degree of liberality he shall observe in his practice: *Shaw v. Nickerson*, 7 U. C. Q. B., 541.

The attorneys in a civil action have full authority to submit all the matters in it to arbitration: *Tilton v. U. S.*, 8 Daly, 84.

In an action against a railroad company to recover damages for injuries sustained by a passenger in consequence of being unlawfully ejected

from its cars, defendant's counsel, as a condition for putting the cause over the circuit, stipulated that in case of the death of plaintiff before final judgment and the termination of the action, the alleged cause of action should survive, and any verdict and judgment be regarded as if rendered in plaintiff's lifetime; and also that, in case of such death, plaintiff's representatives might be substituted as plaintiff. Held, that the stipulation continued in force until final judgment, although meanwhile a verdict and judgment in plaintiff's favor had been set aside. Also, held, that the stipulation was one the attorney for defendant, or its counsel (it having been conceded that the counsel had the same authority as the attorney), had power to make; that the court had the authority to impose the conditions; that it was not against public policy, and was binding upon defendant: *Cox v. N. Y. Cent.*, etc., 63 N. Y., 414, reversing 4 Hun, 176, 6 Thomp. & Cooke, 405; *McGuire v. N. Y. Cent.*, 6 Daly, 70; *Swan v. Clelland*, 13 U. C. Q. B., 335.

The retainer of counsel to make a motion in the cause is sufficient authority from his client to consent to a reference of the action, although it be one of tort. He has authority to enter into such stipulations and agreements, in reference to the proceedings in which he was retained, as counsel usually make, and such as the courts may require to be made and entered into as conditions of granting relief, and such agreements and stipulations bind the client: *Tiffany v. Lord*, 40 How. Pr., 481.

An attorney of record in an action which had been sent to a referee, by order of court, signed an agreement in writing that the report of the referee should be final, and the agreement was entitled as of the term of the circuit court to which the report was to be made. Held, that his client was bound by such agreement: *Brooks v. New Durham*, 55 N. H., 559.

The attorney of the plaintiff in a *ca sa* has authority to consent to the defendant's discharge from arrest; if he does, the sheriff is not responsible for an escape. To discharge the sheriff, the evidence of the consent should be clear, direct, and positive: *Hopkinson v. Leeds*, 78 Penn. St. R., 396.

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When the evidence shows that the attorneys employed in the case have engaged the services of other attorneys, as associate counsel, without the knowledge or consent of the client, an action will not lie against the client to compel the payment of the fees to such associate counsel: *Voorhies v. Harrison*, 22 La. Ann., 85.

Counsel fees, as such, are not recoverable without express agreement, but the fees and expenses of another may be recovered, and in these expenses may be included a reasonable sum paid to counsel for his services. The amount of this sum may be determined by the jury from the circumstances of the case: *Blake v. Elizabeth*, 2 N. J. Law Jour., 328, following *Schomp v. Schenck*, 40 N. J. Law, 195.

The attorneys of one of the parties to an action, being non-residents of the county wherein the action was pending, and having no authority from their client to employ additional counsel, telegraphed to certain resident attorneys to file a certain pleading in such cause on behalf of the client, which they, entering their appearance for the client, did. Certain interrogatories having been filed by the opposite party, directed to such client, the resident attorneys moved to strike them out, and, on the overruling of that motion, forwarded the interrogatories to the non-resident attorneys, who caused them to be answered by the client and then returned them to the resident attorneys to be filed. When the cause came on for trial, the latter attorneys, without being requested so to do, but with the knowledge of the client, assisted the non-resident attorneys in empanelling the jury, in taking down the evidence, and in consultations regarding the defence. Held, in an action therefor, that the resident attorneys are entitled to recover from the client for their services: *Hogate v. Edwards*, 65 Ind., 572.

The employment of an attorney may be proved by circumstances: *Blake v. City*, 2 N. J. Law Jour., 328, District Court U. S. for N. J.

When a client is notified by an attorney of what he is doing for him and observes silence, his acquiescence recognizes the attorney's authority to represent him: *Levy v. Brown*, 56 Miss.,

83; *Johnson v. Gibbons*, 27 Gratt. (Va.), 632.

An attorney is not personally liable to a stenographer for services in taking testimony in a legal proceeding in which he appears as attorney: *Bonyng v. Field*, 44 N. Y. Superior Ct. R., 581; *Doughty v. Paige*, 48 Iowa, 483.

The custom of the attorneys of a certain county to hold themselves responsible for sheriff's fees, in cases wherein they are employed, does not subject an attorney to liability therefor, in the absence of an express agreement or of proof that the attorneys were accustomed to pay for such services regardless of the responsibility of their clients: *Doughty v. Paige*, 48 Iowa, 483.

Where an attorney had made use of the plaintiff's name in a suit without his consent, he was ordered to repay to such plaintiff the costs which he had been obliged to pay to the defendant on failure of the suit: *Henderson v. McMahon*, 12 U. C. Q. B., 288.

See 22 Alb. L. J., 244.

Where an action is commenced by an attorney without the knowledge or consent of the plaintiff, the plaintiff may afterwards ratify the same, and thereafter be entitled to all its benefits: *Dresser v. Wood*, 15 Kans., 844.

Although an attorney, who has collected money, may be made to account therefor in a civil action, the court will compel him to do summary justice without putting the client to the necessity of bringing an action. And this, though the application be to compel the payment to *Kelly & Thorne*, describing them by their firm name and not showing who composed the firm: *Matter of Kerr*, 2 Pugsley & Burbidge (New Brunswick), 625.

C., a solicitor, held a mortgage against B., which he agreed to release and take a mortgage on another lot on exchange of lots by W. to B. All the conveyances were prepared by C. C. never did discharge the first mortgage, although B. paid the full amount thereof and obtained a discharge of the second mortgage. Several years afterwards, and after the death of W., his representatives were called upon by the representatives of one J., to whom the first mortgage had been assigned, to pay the same, and, in a suit brought

thereon, the lands so conveyed by B. to W. were ordered to be sold. On a proceeding to strike C. from the roll of solicitors for malpractice, held, 1, that C., in the transactions, acted professionally for W. and B.; his being the holder of the mortgage from B. was an accident, which did not affect the professional character in which he acted; 2, that whether he was acting professionally or not in the matter, he was, being a solicitor, amenable to the summary jurisdiction of the court, and, under the circumstances, an order was made to strike him off the roll of solicitors, and requiring him to pay the costs of the proceedings against him for that purpose: *Matter of Currie*, 25 Grant's (U.C.) Chy., 338, 23 id., 552.

A wife instituted suit for divorce, and her attorney, acting as peacemaker, at the request of the husband, effected a reconciliation between the parties, and persuaded the wife to dismiss the suit; the husband then executed to the attorney his note, part of the consideration therefor being for services rendered to the wife in the divorce suit, and part for services rendered to the husband in compromising the same: Held, in an action on the note by the payee against the maker, that no recovery could be had on the note, the consideration therefor being void in so far as it was for services rendered to the husband: *MacDonald v. Wagner*, 5 Missouri App. R., 58.

A bill in equity will not lie against an attorney for damages for negligence in investigating a title, but otherwise if such attorney becomes a trustee to invest.

The evidence showing that the attorney, in this case, promised the complainant to obtain first mortgages for her, he was held (it being a case of mingled trust and agency) accountable

for the amount of the incumbrances on the property prior to hers, but not for any subsequent depreciation in the value caused by general business depression, the property at the time of loaning being shown to have been, apart from the prior incumbrances, abundant security: *Norcrede v. Voorhis*, 32 N. J. Eq., 524.

See also *Josephthal v. Heyman*, 2 Abb. N. C., 22.

For a case deciding several points in an action against an attorney for negligence, see *Hastings v. Halleck*, 2 Labatt (Cal.), 218.

An officer had been guilty of an irregularity which made him a trespasser *ab initio*, but neither the party nor his attorney knew of the irregularity. The party and his attorney being present at the sale, the defendant in the execution forbade the sale. The officer inquired of the attorney what he should do, and the attorney after consulting the defendant told him to go on with the sale. Held, neither the party nor his attorney were liable on account of the irregularity of the officer: *Evarts v. Hyde*, 51 Verm., 188.

In *Michigan*, the assignee of a chose in action can sue it in his own name or in that of his assignor. Permission by the assignor of a claim to use his name in collecting it gives the assignee no authority to use any but lawful processes. The assignor of a chose in action is not liable for unlawful acts done by the assignee in collecting the demand, if the assignor himself had no interest in it and did not direct or countenance them. So held, where the assignee, suing in the assignor's name, improperly began suits by *capias*, the affidavit for which was made by the assignor's agent but not in his behalf: *Park v. Toledo*, etc., 41 Mich., 352.

[9 Chancery Division, 212.]

Fry, J., May 15, 1878.

*WADDELL V. TOLEMAN.

[212]

[1877 W. 369.]

Bankruptcy—Equitable Mortgage—Foreclosure—Jurisdiction.

The trustee in bankruptcy of a mortgagee can obtain judgment for foreclosure against the trustee in bankruptcy of the mortgagor, and is not obliged to make his application to the Court of Bankruptcy.

J. T. TAYLOR in 1867 borrowed £1,000 from C. Gwilt on the security of a deposit of the title-deeds of lands in Surrey, with a memorandum of deposit and an agreement to execute a mortgage. In 1869 Taylor made an assignment for the benefit of his creditors to the defendant, J. Toleman, and to S. Taylor (since deceased). In 1872 Gwilt assigned his security to W. Smith. In 1876 Smith was adjudicated bankrupt, and the plaintiff, J. Waddell, was appointed trustee in the bankruptcy.

The plaintiff, as trustee in the bankruptcy of Smith, brought this action against the defendant as trustee of the mortgagor's creditors' deed, claiming foreclosure.

Northmore Lawrence, for the plaintiff, as to the right to bring an action instead of applying to the Court of Bankruptcy, cited *White v. Simmons* (1); *Ex parte Pannell* (2).

G. W. *Lawrance*, for the defendant, objected that, as plaintiff and defendant were both bankrupts, the plaintiff ought to have applied to the Court of Bankruptcy and got an order for the sale of his security. The Court of Bankruptcy would have both parties before it, and could go into the accounts between them. In the cases cited, only the mortgagor was bankrupt.

FRY, J.: The question I have to decide is on a very short point. Taylor made a mortgage by deposit of deeds with one Gwilt. Taylor in 1869 executed a creditors' deed of which the defendant was the *trustee, and Gwilt in [213 1872 assigned his security to Smith. Smith in 1876 became bankrupt, and the trustee in that bankruptcy now comes here and asks for foreclosure. It is not denied that an ordinary mortgagee would be entitled to foreclosure notwithstanding the bankruptcy of the mortgagor, but it has been said that because the plaintiff is also a trustee in bankruptcy he is not entitled to foreclosure, but must apply to the Court of Bankruptcy. That, in my opinion, is not the

(1) Law Rep., 6 Ch., 555.

(2) 6 Ch. D., 335.

law of this country; the trustee in such a case has an alternative right, and if he chooses to apply to this court for foreclosure he can have it.

I give judgment for foreclosure in the usual form.

Solicitor for plaintiff: *Benn Davis*.

Solicitors for defendant: *Lawrance, Plews & Baker*.

[9 Chancery Division, 218.]

Fry, J., May 22, 1878.

GARLAND V. BEVERLEY.

[1876 G. 187.]

Will—Name—Misdescription—Eldest Son—Heir-at-Law—Gavelkind Heirs.

A testator devised lands to William, the eldest son of the testator's nephew. The nephew had two sons, John, the elder, and William, the younger:

Held, that the devise was to William.

A testator made devises of gavelkind lands for lives and in tail, with remainder to his right heirs:

Held, that on failure of the particular estates the lands passed to the heir at common law, and not to the gavelkind heirs.

EDWARD GARLAND, by his will, dated the 12th of August, 1840, gave, devised, and bequeathed all that his freehold estate wherein he then lived at Southfleet, in the county of Kent, and all other his lands, tenements, hereditaments, and real estate whatsoever and wheresoever, unto and to the use of Z. Piggott and J. Matthews, and their heirs, upon trust to permit the testator's nephew John Garland to occupy the same and take the rents thereof during his life, and after his decease "Upon trust to permit and suffer William Garland, the eldest son of my said nephew John Garland, to use and 214] occupy and enjoy the same, *and to receive and take the rents, issues, and profits thereof in like manner for and during the term of his natural life, without impeachment of waste (except as aforesaid), and from and immediately after his decease, upon trust to hold the same unto and for the use of the first son of the body of the said William Garland lawfully to be begotten, and the heirs of his body lawfully issuing; and in default of such issue, to the use of the second, third, fourth, and all and every other the son and sons of the body of the said William Garland lawfully to be begotten severally, successively, and in remainder one after another, as they and every of them shall be in priority of birth;" and in default of such issue, then unto the right heirs of the testator forever.

The testator died in 1840. He had a nephew John Gar-

land, the son of his eldest brother who was dead. John Garland the nephew had had four sons, of whom the two eldest were dead; and there were living at the date of the will and of the testator's death John Garland the nephew, and two sons of his, namely, John Garland the great-nephew, aged about ten years, and William Garland, aged about eight years. The only land belonging to the testator was a farm at Southfleet, which was of gavelkind tenure.

John Garland the nephew died in 1876, and actions were then brought for the administration of the testator's estate, in which two questions were raised on the construction of the will. First, whether the testator by "William Garland, the eldest son of my said nephew John Garland," meant John Garland the great-nephew, who was then the eldest son, or the other son, William Garland? And, secondly, whether, if the devise was to William Garland, the land went on the failure of heirs of his body to the heir-at-law, or to the gavelkind heirs of the testator?

On the first question,

North, Q.C., and *Townsend*, for some of the gavelkind heirs of the testator, contended that the testator meant William Garland. The testator has given the name of an existing person, and in order to displace him, clear proof must be given that he was not meant. *Veritas nominis tollit errorem demonstrationis*: Broome's Leg. Max. ('). But here there is no error, the name is repeated *three [215 times, and the testator must be supposed to have known the names of his nephews: *Doe v. Huthwaite* ('); *In re Felt-ham's Trusts* ('). As to the effect of evidence in such cases to show who was meant: *Bradshaw v. Bradshaw* ('); *Newbol v. Pryce* ('); *Doe v. Hiscocks* ('); *Doe v. Rouse* ('); *Camoy's v. Blundell* ('). The cases of *Adams v. Jones* (') and *Bernasconi v. Atkinson* (') are strongly in our favor. Other authorities are, *Garner v. Garner* ('); *Gillett v. Gane* ('); *Farrer v. St. Catherine's College, Cambridge* ('); *Grant v. Grant* ('). There is no rigid rule, and the court has merely to find whom the testator meant. There is no evidence to show that the testator did not mean the great-nephew whom he has named. The name is right, and he has merely added

(1) Page 637.

(2) 8 Taunt., 306; 2 Moo., 304; 3 B. & A., 632.

(3) 1 K. & J., 528.

(4) 2 Y. & C. Ex., 72.

(5) 14 Sim., 354.

(6) 5 M. & W., 368.

(7) 5 C. B., 422.

(8) 1 H. L. C., 778.

(9) 9 Hare, 455.

(10) 10 Hare, 345.

(11) 29 Beav., 114.

(12) Law Rep., 10 Eq., 29.

(13) Law Rep., 16 Eq., 19; 6 Eng. R., 615.

(14) Law Rep., 5 C. P., 727.

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an erroneous description. In *Charter v. Charter* (¹) the name was not given at all.

Kekewich, Q.C., and *F. G. Bagshawe*, for defendants in the same interest: The testator has simply selected one of his great-nephews, and has devised the farm to him: *Goodwyn v. Goodwyn* (²).

Ingle Joyce, for John Garland the great-nephew, eldest son of John Garland the nephew: The testator's great-nephews were children, and he was very likely not to know their names. The whole disposition of this will is to settle the property on the eldest family, and he clearly meant his eldest great-nephew, but made a mistake in the name. *In re Feltham's Trusts*; *In re Nunn's Trusts* (³); *Drake v. Drake* (⁴) show that the description has generally prevailed over the name. *Hodgson v. Clarke* (⁵).

216] **Speed*, for the trustees.

North, in reply.

FRY, J., read the clause of the will, and stated the facts of the case, and continued:

It is therefore apparent that there was no such person as "William Garland, the eldest son of my said nephew John Garland." There was a William Garland, who was the youngest son of the testator's nephew John Garland, and there was a John Garland, who was the eldest living son of the testator's nephew John Garland. I have, therefore, before me the case of a devise in which the object of the devise is described in language which in its entirety fits no existing person. In that state of circumstances the question which I have to answer is this, In which portion of the language by which the object of the testator's bounty is described must I assume the greatest intensity of force or meaning to reside? In which is it most likely that the testator was careful and exact? In which is it most likely that he was careless or inexact? In which part of the entire description is there the greater, and in which is there the lesser, probability of error?

Now, I will refer to the language in which the question is stated by the Vice-Chancellor Sir W. P. Wood, afterwards Lord Chancellor, in the case of *Bernasconi v. Atkinson* (⁶): "The principle of the cases is, that where there are two descriptions—where the testator specifies in two different ways the object of his bounty, the court adopts that which, in each instance, appears to be the least open to error." Now,

(¹) Law Rep., 7 H. L., 864; 12 Eng. R., 1.

(⁴) 8 H. L. C., 172.

(²) 1 Ves. Sen., 226.

(⁵) 1 D. F. & J., 394.

(³) Law Rep., 19 Eq., 331; 11 Eng. R., 863.

(⁶) 10 Hare, 346, 352.

which in this case is the least open to error: the name "William," or the description of "eldest son"? I think there is the least probability of error in the name "William," and for this reason, that a man's name is a thing by which he is usually called, and when you want to speak of the man you usually are exact in his name, although you may be inexact in the description you give either of his parentage or of his residence, or of the other incidents or accidents which attach to him. That appears to me to be commonly though not necessarily the case. It has been urged that in this case the description "eldest son" is *more prob- [217 ably right than the name "William," and for this reason. It is said that the name "William" expresses no reason for the devise, but the description of eldest son carries with it the motive which induced the testator to make him the object of his bounty. The will must undoubtedly be looked at to ascertain whether that is or is not the case.

Now, the argument of Mr. Ingle Joyce on that part of the case is this. He has said that the testator recognizes the principle of primogeniture which is so familiar in the dispositions of landed property in this country, that he gives the property in the first place to the sole son of his eldest brother, recognizing, therefore, the eldest branch; and, having given it to him for life, it was probable that he would give it to his eldest son in succession. No doubt that is very probable, but it is not like the case of a father settling his own property in strict settlement upon his own descendants, and it is simply the case of a testator providing a life interest for a nephew, and desiring to make some provision for some members of the family of that nephew. Now it is quite possible that the nephew may have had property of his own. It is quite possible that the testator may have expected that his nephew would provide, at any rate, for his eldest son. It is also quite possible that the second son may have been an object of special favor with the testator. It is not the case of a will creating a strict family settlement of property, but excluding the eldest son, under circumstances which rendered it improbable that the eldest son was intended to be excluded. It appears to me, therefore, that there is nothing in the expression "eldest son" which countervails the probability that the name expresses the real will and meaning and intent of the testator.

As confirming the conclusion at which I have arrived, I desire to draw attention to that which is undoubtedly only a *dictum*, but still a *dictum* entitled to weight, of Lord

Brougham in the case of *Camoy's v. Blundell* (¹): "For instance, take the case of a gift to A. B., the eldest son of C. D., and there exists an A. B., a second son of C. D., to take; there, apparently, the name is right. But A. B. is the second son of C. D., and consequently he must take as A. B. if he take at all, and he cannot take as the eldest son 218] of *C. D., inasmuch as that *demonstratio personæ*, or description, does not apply to him, he being the second son of C. D." Lord Brougham, therefore, by way of illustration, gave the particular case which has occurred in this litigation, and he apparently came to the conclusion that the name ought, in that instance, to prevail.

The maxim which finds its expression in Lord Bacon's *Maxims of the Law* (²), as *Veritas nominis tollit errorem demonstrationis*, has been pressed upon me as entitled to great weight in the decision of this case; but it is a maxim from which I feel it exceedingly difficult to derive any light. What are the conditions under which that maxim is to be applied? You must first find the "*veritas nominis*," that is, you must find the true intent of the testator as expressed in the name. In the next place, you must find that there is "*error demonstrationis*," that is to say, you must find that the demonstration or description is inaccurate. But when I have found those two things I want no maxim at all. It appears to me, therefore, that it is like a pilot who comes on board your vessel when you have got into harbor. It gives you guidance when you are safe through the shoals. I have found it, therefore, difficult to derive any light from that maxim, and I observe that the learned judges and members of the House of Lords have expressed the great difficulty which they found in deriving any light from it. Lord Bacon, however, has explained the maxim in a way which, if it is to be followed, does undoubtedly afford some assistance. He says: "There be three degrees of certainty: 1. Presence; 2. Name; 3. Demonstration or Reference. Whereof the presence the law holdeth of the greatest dignity, the name in the second degree; and the demonstration or reference in the lowest, and allows the error or falsity in the less worthy." That is to say, if there be the name and demonstration, and the two cannot fit one and the same object, you are to take the name and neglect the demonstration—you are to presume the error or falsity to be in the demonstration and not in the name. Having applied the rule to land, and to the subject-matter of the gift, he applies it to the object of the gift. He says (³): "The

(¹) 1 H. L. C., 778, 792.

(²) Reg. 25, Law Tracts, p. 102.

(³) Page 101.

like reason holds in demonstrations of persons that have been declared in demonstration of lands and places, the *proper name of everieone is in certaintie worthiest, [219 next are such appellations as are fixed to his person, or at least of continuances, as sonne of such a man, wife of such a husband; or addition of office as clerke of such a court, &c." This language does appear to assist the argument of the plaintiffs, but I think it very difficult to give much weight to it when I look at the decisions of the highest tribunal on this point. In the case of *Camoy's v. Blundell* (¹), Lord Brougham expressed the difficulties which he found in applying that rule. Still more pointedly, in the case of *Drake v. Drake* (²), the Lord Chancellor, Lord Campbell, said, "I think that there is no presumption in favor of the name more than of the demonstration." In like manner, in *Bradshaw v. Bradshaw* (³), the Chief Baron said, "It has generally been found where mistakes have been assumed to have been made either in the name or description of the devisee, or the property devised, that the mistake has been made in the name and not in the description." The same view was expressed by Lord Hatherley when Vice-Chancellor. He says, in *Bernasconi v. Atkinson* (⁴), "It certainly does appear singularly enough that the description of the legatee has in most of the cases referred to prevailed over the name." I advert to this in order to show that my decision does not rest upon the principle of any presumption or inference of law in favor of the name over the description taken abstractedly. I have neglected that principle, although if I had followed it it might have afforded an additional support to the conclusion at which I have arrived. The ground upon which I have proceeded is simply this. I have inquired of myself, looking at the will and the circumstances of the case, in which is the probability of error the greater, in the name or in the description? I answer that the probability of error is greater in the description than in the name, and therefore hold that the devise was to William and not to the eldest son.

William Garland was dead, unmarried. The devise to him and the heirs of his body had therefore failed and the devise over to *the right heirs of the testator took [220 effect; and the question whether the heir at common law or the gavelkind heirs succeeded under the devise to the right heirs was argued.

(¹) 1 H. L. C., 778.

(²) 8 H. L. C., 172-179.

(³) 2 Y. & C. Ex., 86.

(⁴) 10 Hare, 352.

North, Q.C., and *Townsend*, for some of the gavelkind heirs: The only land which the testator had was gavelkind, and he must have meant gavelkind heirs: *Robinson's Gavelkind* (¹); *Co. Litt.* (²).

[FRY, J., referred to *Doe v. Jones* (³).]

Vin. Ab., tit. "Heir" (⁴). The cases of *Thorp v. Owen* (⁵) and *Polley v. Polley* (⁶) are quite distinguishable. The observations of the Vice-Chancellor in *Sladen v. Sladen* (⁷) are strongly in favor of the gavelkind heirs. The words "right heirs" must mean the persons to whom the property would go on the death of the owner intestate. If he had said "my gavelkind heirs" it would have been clear, and does not this amount to the same thing? The act 3 & 4 Will. 4, c. 106, s. 3, makes no difference. Before that act heirs would have taken by descent, now they take by purchase, and that is all.

Kekewich, Q.C., and *F. G. Bagshawe*, for the devisees of John Garland the nephew, who was the common law heir of the testator, cited *De Beauvoir v. De Beauvoir* (⁸); *Hawkins on Wills* (⁹); *Theobald on Wills* (¹⁰).

Townsend, in reply.

FRY, J., after reading the words of the devise, continued: The question is, who takes under that limitation to the right heirs of the testator? In my judgment, the expression "my own right heir," or "right heirs," means, according to the law of England, the heir or heirs of the testator at common law. About that, as a general proposition, I imagine no doubt can be entertained. Then, is that meaning altered by 221] the fact that the testator was *possessed of gavelkind lands? In my opinion it is not. Is it altered by the fact that he devises gavelkind lands? In my opinion it is not.

It appears to me that this point has in substance been decided a great many years ago. I find that so long ago as the 37th Henry VIII, this was decided (*Brooke, Ab. Done and Remainder* (¹¹)), "That if land of gavelkind is leased for life, the remainder to the right heirs of W. M., who has issue four sons and dies, and then the tenant for life dies, the eldest son of W. M. shall alone have the land, for he is the right heir, and this is a name of purchase." That has been followed by the high authority of Lord Coke, who expresses the rule in this way (*Co. Litt.* (¹²)): "If lands of the

(¹) New ed., p. 69.

(²) 10 a.

(³) 2 Dow. & R., 378.

(⁴) G. 5.

(⁵) 2 Sim. & Giff., 90.

(⁶) 31 Beav., 363.

(⁷) 2 J. & H., 369.

(⁸) 3 H. L. C., 524, 541.

(⁹) Page 168.

(¹⁰) Page 167.

(¹¹) Pl. 42.

(¹²) 10 a.

nature of gavelkind be given to B. and his heirs, having issue divers sons, all his sons after his decease shall inherit, but if a lease for life be made, the remainder to the right heirs of B. and B. dieth, his eldest son only shall inherit, for he only to take by purchase is right heir by the common law. So note a diversity between a purchase and a descent." And Mr. Hargrave in the note to that passage has explained, as it seems to me, with great clearness the right view upon this point. He says, "The reason seems to be that though the subject of the gift is customary land, the heir at common law is presumed to be meant unless words are added to describe the customary heir. But if such special words are used the presumption fails, and then it is said that though the subject of the gift is common law land, yet the customary heir shall be preferred."

Therefore it appears to me to stand in this way: if I give customary land, gavelkind land, borough English land, personal estate or leasehold estate to my right heirs, the words mean my heir at common law. If I give land in common socage to my heirs in gavelkind, the words mean my heirs in gavelkind.

But, then, it is said that those old authorities are not binding, and for this reason: that in Co. Litt. (') it is laid down that "if A. have issue a son and a daughter and a lease for life be made, the remainder to the heirs females of the body of A. A. dieth; the heir female can take nothing, because she is not heir; for she must be both heir and heir female, which she is not." It is said, *and said truly, that [222 that principle has been overruled; and it is averred that because that proposition has been overruled the other has gone with it. I am bound to say that I do not see the sequence upon which that argument rests, and I observe that the learned Vice-Chancellor Sir John Stuart was equally unable to see it when a similar argument was addressed to him in *Thorpe v. Owen* (").

There are several cases since these old authorities, but it so happens, rather curiously, that none of them have raised the precise point. It may be observed with regard to those cases that they fall under two classes. One class is where a mixed property has been given to the heirs or right heirs of the testator, and where one of the ingredients of the mixed property has been socage land; and it is said that that is the reason why the common law heirs take. It seems to me not to be so; for it seems to me the reason is, that the right heir is the common law heir. The other class of cases

(') 24 b.

(") 2 Sm. & Giff., 90.

is where the gift has been, not to the heirs of the testator himself, but to the heirs of some third person, and it is said that that makes a difference. I am at a loss to see why it makes a difference. It appears to me that this point is amply covered by authority, and I hold that the words "right heirs" are words of purchase, and that the person answering that description is the common law heir.

I have attended with that respect with which I shall always attend to any doubt of Lord Hatherley or to any expression of his opinion, to the observations in *Sladen v. Sladen* (1), and I need hardly say that if Lord Hatherley had expressed a decided opinion I should have felt myself bound to follow it; but, observing that he carefully avoided expressing anything like a decided opinion upon the point, it does not appear to me that I should be right in following the expression of doubt which he there gave utterance to in opposition to those old authorities which, in my judgment, are clear upon the point.

I may add further, that though the cases of *Polley v. Polley* (2) and *Thorp v. Owen* may not determine the precise point, yet when looked at to ascertain the principle on which [223] the judges *proceeded, they seem to me to be very strong confirmation of the conclusion at which I have arrived.

There will, therefore, be a declaration that the common law heir takes.

Solicitor for gavelkind heirs: *T. C. Matthews.*

Solicitors for devisees of John Garland: *Keen & Rogers.*

Solicitor for other parties: *T. Sismey*, agent for Arnold, Fooks & Co., Gravesend.

(1) 2 J. & H., 369.

(2) 31 Beav., 363.

[9 Chancery Division, 223.]

Fry, J., June 4, 5, 1878.

SMITH V. WHEATCROFT.

[1878 S. 445.]

Specific Performance—Variation—Pleading—Misrepresentation—Person contracted with.

In defence to an action for specific performance of a contract as expressed in a document stated by the plaintiffs, the defendant pleaded that the document did not contain the true terms for the purchase, but he did not state what the true terms were. The defendant afterwards produced a written agreement for purchase containing terms differing from those in the document stated by the plaintiffs. The plaintiffs amended their statement of claim, but continued to claim specific performance of the contract as stated by them:

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Held, that, the plaintiffs asking at the trial to have specific performance with a variation according to the terms of the agreement produced by the defendant, the action would not be dismissed, but judgment would be given for specific performance with the variation.

Where personal considerations enter into a contract, error as to the person with whom the contract is made annuls the contract; not so where the person sought to be bound would have been equally willing to make the same contract with any other person.

THIS was an action by Joseph Smith, W. Jessop, F. B. Wright, and F. Wright, against John Wheatcroft, for specific performance of an agreement to sell a piece of freehold land called Greaves Closes, at Crich, in the county of Derby.

The re-amended statement of claim alleged that the defendant Wheatcroft agreed to sell the piece of land to the plaintiff Smith for £600, and that the agreement was expressed in writing, signed by Wheatcroft and delivered to Smith, as follows: "Received the 26th day of June, 1876, of Mr. Joseph Smith, the sum of £60 *deposit on account of [224 purchase-money of the Greaves Closes by the brook at Crich. Purchase-money £600. To be completed on the 29th September next." That Smith entered into negotiations for the purchase of this land on his own account, but subsequently agreed with the other plaintiffs, W. Jessop, F. B. Wright, and F. Wright, who carried on business as the Butterley Colliery Company, that they should have the benefit of the agreement, and it was ultimately entered into by him as their agent; and the plaintiffs claimed specific performance, with an abatement in respect of the right of dower of the widow of the defendant's father.

The defendant by his statement of defence alleged that he had been induced by Smith to sign the receipt on a representation that Smith wished to purchase the land for his own personal use, in order to hold the same with other land belonging to him or his father, and that Smith knew that the defendant was unwilling to sell to the Butterley Colliery Company; the defendant further alleged that the widow of the defendant's father was entitled to dower out of the closes; that the receipt did not contain the true terms of the agreement; and that "the agreement, if any agreement binding on the defendant was come to, was for the purchase of the surface only of the land, with a full reservation to the defendant of all minerals and mining rights." The statement of defence did not refer to any other written agreement; but the defendant had in his possession a document signed by Smith, as follows:—

"The said John Wheatcroft agrees to sell, and the said Joseph Smith agrees to purchase, all those five closes of

land situated in Crich aforesaid called the two Greaves Closes, by Mold Lane, on the west side of the brook, and the three Greaves Closes on the east side by the brook, and particularly named the Upper Greaves with the inlake or pingle, the Meadow Spot, the Nether Greaves, the Great Close and the Little Close, and containing seven acres and a half, or thereabouts, be the same more or less, and now in the occupation of James Smith, except and reserved all minerals, stone, and clay, and full liberty to enter at all times and search for and get the same. And the said John Wheatcroft agrees to sell the land for the sum of £600. Possession of the premises or receipt of the rents to be entered upon by 225] the said Joseph Smith on the *29th day of September next, at which time the purchase is to be completed."

This document was mentioned in the affidavit of documents filed by the defendant, and was then seen by the advisers of the plaintiffs.

The statement of claim was afterwards amended, still, as above stated, claiming performance of the agreement to sell without reservation of the minerals. The action came to a hearing, and W. Smith was examined on behalf of the plaintiffs. The further facts and the result of the evidence are stated in the judgment of Mr. Justice Fry.

North, Q.C., and *Hamilton Humphreys*, for the plaintiffs: On the question of fraud or misrepresentation as to the real purchaser: *Phillips v. Duke of Buckingham* (*); *Fellowes v. Lord Gwydyr* (*); *Nelthorpe v. Holgate* (*).

Cookson, Q.C., and *R. Roberts*, for the defendant: The plaintiffs still insist on the performance of the agreement alleged by them, which is equivalent to charging the defendant with fraud in obtaining the memorandum of agreement, and if the plaintiffs fail in that, or in making out their allegations, the action must be dismissed. They cannot have a new term inserted in an agreement set up by them.

[FRY, J., referred to *Joynes v. Statham* (*), and to *London and Birmingham Railway Company v. Winter* (*), and suggested that the plaintiffs should submit to the variation.]

We must admit that there was an agreement to sell, but with the minerals reserved, and the plaintiffs cannot now change front and begin a new case: *Woollam v. Hearn* (*). The agreement was, however, obtained by fraud, and by the defendant being led to think that he was selling to an

(*) 1 Vern., 227.

(*) 1 Russ. & My., 83.

(*) 1 Coll., 203.

(*) 3 Atk., 388.

(*) Cr. & Ph., 57.

(*) 7 Ves., 211.

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adjoining landowner and not to a colliery company: *Lord Irnham v. Child* ('); *Cadman v. *Horner* ('); Sug- [226 den's Vendors and Purchasers ('); and the court will not enforce the performance of a contract obtained in that manner.

FRY, J.: In this action the plaintiffs sue for the specific performance of an agreement to sell certain closes described as the Greaves Closes. It is now the common case of the plaintiffs and defendant that there was an agreement, the plaintiffs of course alleging that the agreement is one which ought to be performed, the defendant, whilst admitting at the bar there was an agreement, alleging two things, first, that the agreement sued upon by the plaintiffs was not the true agreement, and that, under the circumstances, the variation ought to defeat the plaintiffs' right to specific performance; and, secondly, that the agreement so entered into was tainted with fraud, to use the language of the defendant's counsel, or, to put it more precisely as the statement of defence puts it, was obtained by misrepresentation. These are the two questions I have to determine. [His Lordship then stated the contents of the receipt and of the agreement.] It does not escape my attention that Smith has said that the agreement was never read over by him, and that nothing was said at the interview with regard to the reservation of the mines and minerals. But, seeing that that point was not raised by the pleadings, and that the plaintiffs had the opportunity of showing that the memorandum of agreement did not contain the true terms of the bargain, I think I should be going too far to allow the plaintiffs now to say that the memorandum of agreement did not comprise the true terms. I therefore think that the plaintiffs must be bound to submit to the terms of that written instrument or to have their bill dismissed. In that case, as I understand, the plaintiffs ask to have the specific performance with the reservation.

Then arises the further question, whether, that being the state of things, I ought to dismiss the action because of the variation between the agreement stated by the plaintiffs in their pleadings *and the agreement to which, under [227 the compulsion of the court in a certain sense, the plaintiffs submit. I take the general rule with regard to variations to be as stated by Lord Cottenham in *London and Birmingham Railway Company v. Winter* ('), that it depends on the particular circumstances in each case whether the variation set up from the written contract "is to defeat the

(') 1 Bro. C. C., 92. (2) 18 Ves., 10. (3) 14th ed., p. 211. (4) Cr. & Ph., 62.

plaintiff's title to have a specific performance, or whether the court will perform the contract, taking care that the subject-matter of this parol agreement or understanding is also carried into effect, so that all parties may have the benefit of what they contracted for."

Now, what are the special circumstances in this case? According to the uncontradicted evidence before me, this memorandum was never read over by Smith. The plaintiffs sue upon the receipt, and it would have been more prudent on the part of the defendant if he had made the receipt correspond more exactly than it did with the terms of the contract. The defendant, in his statement of defence, undoubtedly sets up that the receipt did not contain the true terms or all the terms of the purchase, and that the agreement, if any agreement binding on the defendant was come to, was for the purchase of the surface only of the land with a full reservation to the defendant of all minerals and mining rights, but he did not state what the real agreement between the parties was. Nor did he even admit that there was any agreement, for he made it hypothetical; nor did he submit to perform the real agreement; nor was it until he filed an affidavit of documents that he disclosed this written agreement. Therefore, down to that time it does not rest with the defendant to say that the plaintiffs ought to have been in possession of the terms of the agreement. It is quite true that after the affidavit of documents was filed, the plaintiffs re-amended the statement of claim, but did not adopt the memorandum of agreement; and to that extent, and to that extent only, is there any foundation for the defendant's argument that the plaintiffs repudiated this agreement.

It appears to me that the mere fact that the plaintiffs so re-amended the statement of claim without adopting the terms of the agreement, is not a ground upon which I can 228] say that it is *inequitable or unjust that the plaintiffs, submitting to the variation between the receipt and the agreement, should have specific performance of the agreement.

Several cases have been cited to me upon this point. The first in point of time is *Legal v. Miller* (¹). There the defendant set up the agreement, and fully disclosed to the plaintiff that which he said was the true agreement between the parties, and he appears further to have submitted in effect to perform the agreement which he set up; so that the litigation would have been ended if the plaintiff had

(¹) 2 Ves. Sen., 299.

been willing to adopt the true agreement. This appears from what the Master of the Rolls says, that it "would be very hard upon a defendant if a plaintiff should unconscientiously bring him into a court of equity when defendant should insist on an agreement different from that which the plaintiff sets up, and the plaintiff should reply to his answer and insist on his former demand, and go into a long proof; and afterwards finding he cannot have the decree prayed by his bill, should resort to that which defendant sets up, and insist on a decree for it." The next case is *Lindsay v. Lynch* (*). There the Lord Chancellor of Ireland came to the conclusion that he would be opening a door to new frauds if he allowed the plaintiff to avail himself of the agreement which was set up, and which he had throughout refused to act upon. "On principle, therefore, for example-sake, and to prevent practices which must tend to great fraud, I conceive that the bill ought to be dismissed notwithstanding the admissions of the defendant in his first answer;" but he allowed another bill to be filed. It appears to me that that case is not one which makes it incumbent on me to pursue the same course in this case, and I do not think I should be opening any door to fraud by allowing the plaintiff to submit to a parol variation. The case of *Jeffery v. Stephens* (†) is a case in which the defendant also set up an agreement which had from the first been repudiated by the plaintiff. The plaintiff had been in possession, and had throughout the period of his possession repudiated the true agreement by acting in contravention of it. There was an additional difficulty, which also was relied upon by the Master of the Rolls, that the *agreement set up by [229 the defendant, like the agreement set up by the plaintiff, was void for uncertainty.

These cases seems to me to be very different from this case. If in this case the defendant had stated the terms of the agreement distinctly and precisely—if he had stated that there was one variation and one variation only on which he relied, and if in addition to that he had submitted to perform the agreement so stated, it is exceedingly likely that if the plaintiffs after that had insisted on the other agreement I should have found it my duty to dismiss the action with costs. But, instead of stating the true agreement, the defendant only alleged that the receipt which he himself had signed did not contain the true terms; that there was no binding agreement; and that the agreement, if any, was tainted with fraud. That head of defence therefore fails.

(*) 2 Sch. & Lef., 1, 10.

(†) 6 Jur. (N.S.), 947.

The next question is, whether there is fraud in the agreement. Now, the circumstances which it is material to consider on this part of the case are these:

[His Lordship then stated what in his opinion were the circumstances proved in the case. The defendant was minded to sell these closes of land and had offered them for sale to others. The plaintiff Smith and the defendant had an interview on the 16th of June, when the defendant asked £600 and Smith offered £585: and his Lordship expressed his opinion that the statements then made by Smith were not misrepresentations, but were arguments to induce the defendant to let Smith have the land at a lower price. Smith then made up his mind not to buy, but in the meantime he found that the Butterley Company were willing to buy at that price, and on the 26th of June he had another interview with the defendant, and the agreements were signed. The defendant had not suggested that he had sold the land to the plaintiff Smith for less than he would have taken from any one else, and his Lordship was of opinion that this defence was an afterthought. No doubt on the 16th of August the defendant wrote a letter in which he said he had been deceived. But even in that letter he did not suggest that he had taken less from Smith than he would have taken from any one else. His Lordship then continued:]

Now, it appears to me that on the general question I cannot try the case more favorably than by applying the principle laid down by Pothier, *Traité des Obligations*, § 19. He says, "Does error in regard to the person with whom I contract destroy the consent and annul the agreement? I think that this question ought to be decided by a distinction. Whenever the consideration of the person with whom I am willing to contract enters as an element into the contract which I am willing to make, error with regard to the person destroys my consent and consequently annuls the contract. . . . On the contrary, when the consideration of the person with whom I thought I was contracting does not enter at all into the contract, and I should have been equally willing to make the contract with any person whatever as with him with whom I thought I was contracting, the contract ought to stand." I ask myself here whether the defendant has shown that any personal considerations entered into this contract? Has he shown me that he would have been unwilling to enter into a contract in the same terms with anybody else? I say distinctly that he has failed to produce such an effect on my mind,

and that being so, I think the second head of defence must fail as well as the first.

The result is, that I give judgment for specific performance with the reservation of the minerals. There will be the usual inquiry as to title, and the plaintiffs must have the costs of the action.

Solicitors for plaintiffs: *Johnson & Weatheralls.*

Solicitors for defendant: *Chester & Co.*

In general, an actionable misrepresentation consists in a false statement respecting a fact material to the contract, and which is influential in producing it. Statements of mere matters of opinion or judgment, although known to be false, do not constitute fraud in the absence of trust and confidence: *Wise v. Fuller*, 29 N. J. Eq., 257.

If the vendor is not induced to enter into a contract by false representations of the vendee, the fact that the latter made such representations during the negotiation of the contract will not avoid it: *Bronson v. Crocker*, 8 N. Y., 182, affirming 10 Barb., 406.

Though, it seems, any representation that affects the price of an article, in regard to which one party places confidence in the other, will, if relied on, and is false, and the party trusting to the representation is injured, render the contract void: *Smith v. Countryman*, 30 N. Y., 655.

There is a class of cases in which the fraud is of such a sort that the minds of the parties never meet, and no property passes. A clear instance would be when a party obtains goods by representing that he is agent for another, and the seller thinks he is selling to the supposed principal, when in fact no agency exists. There is here no sale to either party: *Hardman v. Booth*, 1 Hurl. & C., 803; *Higsons v. Burton*, 26 L. J. (N.S.), Ex., 342; 2 Kent (12th ed.), 482 note.

Where one, to induce another to sell his hops, falsely represented he had purchased a neighbor's hops, and the seller relying upon the same and his neighbor's prudence and judgment, entered into an agreement to sell his hops:

Held, such fraud authorized a rescission of the contract: *Smith v. Coun-*

tryman, 30 N. Y., 655; *Smith v. Kay*, 7 House of Lords Cases, 759.

It has been laid down by a careful writer, upon the authority of several English cases, that it is not a fraud for one to represent he is purchasing for another as his agent, when he is in fact purchasing for himself: *Kerr on Frauds* (1 Eng. ed.), 297; *Fellows v. Gwydyr*, 1 Simons, 63, affirmed 1 Russ. v. Mylne, 83; *Nelthorpe v. Holgate*, 1 Coll. Chy., 203.

But we think the doctrine should be qualified by the rule that it should first be found, as a fact, that such false representation did not in any way operate to induce the party to enter into the contract: 3 Pars. on Cont., 354 note *m.* (5th ed.); *Phillips v. Duke*, etc., 1 Vern., 227, and cases cited in *Rathby's Notes*; 1 Eq. Cases Abr., 18 pl., 10; *Smith v. Countryman*, 30 N. Y., 655; *Smith v. Kay*, 7 House of Lords Cases, 759.

And the learned author substantially so qualifies the rule elsewhere: *Kerr on Frauds*, 45 (1 Eng. ed.).

Black, as agent for the owners, contracted to sell a large quantity of land in Maine, which contract was assigned by the vendee until it came, through mesne assignments, to Miller and others. Payments were made from time to time on account; but at length, in consequence of a failure to make the payments stipulated in the contract and by virtue of a clause contained in it, the contract became void. In this state of things Miller employed one Paulk to ascertain from Black the lowest price that he would take for the land, and then to sell to others for the highest price he could get. Paulk sold and assigned the contract to Davis for \$1,050. Upon the theory that Paulk and Davis entered into a fraudulent combination, still, Miller and others

are not entitled to demand that a court of equity should consider Davis as a trustee of the lands for their use. They had no interest in them, legal or equitable, nor anything but a good-will, which alone was the subject-matter of the fraud, if there was any. But the evidence showed that this good-will did not exist, for Black was not willing to sell to Miller and others for a price less than to any other person. Although Paulk represented himself to be acting for Miller and others, when in reality he was representing Davis, yet he did not obtain the land at a reduced price, thereby; but, on the contrary, at its fair market value: *Garrow v. Davis*, 15 How. (U.S.), 272.

Partners bought the interest of a fellow partner through a third person, concealing that the purchase was for them. Held, that such purchase was not *per se* fraudulent: *Geddes' Appeal*, 80 Penn. St. R., 442.

The plaintiff having sued upon a promissory note and on the common counts for goods sold and delivered, etc., defendant pleaded to the whole declaration that the goods were sold on credit, and before it had expired the plaintiff accepted from him a less sum in full satisfaction.

Issue having been taken on this plea, it appeared that the plaintiff had settled for half the amount and given a receipt in full to M., the defendant's brother-in-law, who paid it; but this settlement was brought about by a letter from M. to the plaintiff, saying that he had just heard from the defendant, who was in New York and on his way to California, and had placed means within his reach to pay 50 cents in the dollar, which the writer offered in full. There was strong ground for supposing the defendant never was in New York, or intended to go to California. The jury having found for the plaintiff for the half of the debt unpaid:

Held, that the plea should have been demurred to, as pleaded to the whole declaration, and answering only the claim for goods sold; but though the parties had treated it as an answer to the action, the court, under the circumstances, instead of amending it, directed a repleader, with leave to the plaintiff to reply fraud to the plea when amended:

Semble, that the settlement, if obtained on the representation, knowingly

false, that defendant was in New York and on his way to California, would not bind the plaintiff; but *quære*, whether the plaintiff could reply the fraud, having affirmed the settlement by receiving and retaining the money: *Turner v. Bowerman*, 29 U. C. Q. B., 187.

One who complains that he was induced to buy goods by defendant's fraudulent statements, cannot prove the acts and sayings of other persons as inducements, unless he avers a conspiracy and enumerates the false statements: *Jackson v. Collins*, 39 Mich., 557.

Although a buyer is not liable in a suit for deceit, for misrepresenting a seller's chance of selling for a good price, when he is under no legal obligation to the seller for the accuracy of his statement, yet he will be liable if there is any peculiar relation between the parties implying or leading to confidence.

Hence, a president of an insurance company, who professed a desire to aid a stockholder in selling his stock, and advised and effected a sale thereof at a certain price, causing the transfer to be made to a third person whom the stockholder supposed to be the purchaser, but who really took it for the president and afterwards transferred it to him, was held liable to such stockholder for the difference between the real value of the stock and the price for which it was sold: *Fisher v. Budlong*, 10 R. I., 525.

If a person induces the owner of a horse or a vessel to part with possession with a view to a particular purpose, for the benefit of the owner, as for a sale, and intending, and fraudulently concealing the intention, to use it for another and different purpose, for his own benefit and inconsistent with the agreement, it is fraud, which avoids the agreement. The plaintiffs having agreed with the defendants, the owners of a ship, to be allowed to load her and take her to Constantinople, or any port on the Mediterranean or Black Sea, with an option to purchase her at a fixed price at any time within six months; and if she should not be purchased, to return her, paying all the expenses, but nothing being payable for the use of the vessel, and only an outward voyage being mentioned; but the plaintiffs, although

knowing that the defendants, the owners, would not have let the vessel for trade or on charter, having already arranged to sublet the vessel for a homeward voyage, and not only not disclosing this, but representing to the owners the contrary, intending thus to get possession of the vessel, and then to use it for their own benefit, to the prejudice of the owners :

Held, in an action against the owners for not giving the possession of the vessel, that supposing the agreement did not allow of their thus using the vessel for their own advantage (as *semble*, it did not), there was evidence of a fraudulent misrepresentation upon their parts, which would avoid the contract ; and, *semble*, that if the agreement did not allow of it, there was a defence apart from fraud ; and that even if it did allow of it, there was a defence on the ground of fraud : *Bennett v. Dossett*, 4 F. & F., 600.

A statement that a greater rent is reserved, or that the income of property is greater than it is in fact, being matters peculiarly within the vendor's knowledge, are fraudulent representations for which an action will lie : *Wise v. Fuller*, 29 N. J. Eq., 257.

Where the agent of A. had, by verbal agreement, sold land belonging to A.

to B., and before A. had been notified of the sale, C. went to A. and falsely represented to him that he was sent by his agent to see about buying the land ; and C. knew of the sale by A.'s agent, and withheld the knowledge from A., and induced A. to sell the land to him and execute a deed for the same, and deposit such deed to be held as an escrow, until the balance of the purchase-money was paid, and A., as soon as notified of the previous sale by his agent, confirmed the same and executed a deed to B., and the prior deed was recorded ; upon a bill filed by C. for a specific performance, and a cross bill filed by B. to cancel the record of the deed to C., and that C. surrender possession : Held, that the bill filed by C. was properly dismissed, and the relief sought by the cross bill of B. was properly granted : *Mitchell v. King*, 77 Ills., 462.

Assumpsit for money had and received to plaintiff's use, lies to recover back the amount of the over payment, where a purchaser who had agreed to pay what the property had cost his vendor, found, after paying, that the latter had deceived him as to the amount. The false representation will not support an action for tort : *Barnard v. Colwell*, 39 Mich., 215.

[9 Chancery Division, 231.]

Fry, J., June 18, 1878.

*GREEN V. TRIBE.

[231

[1876 L. 225.]

Will—First Codicil—Revocation—Second Codicil—Confirmation.

Where a testator by a codicil confirms his will, the will together with all previous codicils is taken to be confirmed.

A testatrix by her will gave shares in her residue to her nephew. By a codicil she revoked all devises and bequests to her nephew. By a second codicil she devised certain after-purchased property to the trustees of her will and confirmed her will :

Held, that the second codicil did not revoke the first, and that the after-purchased property went according to the will and first codicil together, and not according to the will alone.

Crosbie v. MacDowal (1) and *Burton v. Newbery* (2) observed upon.

ELIZABETH LOVE, by her will dated the 9th of February, 1872, gave to trustees the sum of £1,000 upon trust to invest the same, and to pay the income to her niece Ellen Love

(1) 4 Ves., 610.

26 ENG. REP.

(2) 1 Ch. D., 234 ; 15 Eng. R., 713.

during her life, and after her decease upon trust for her children as therein mentioned. And the testatrix devised her residuary real estate to trustees on trust for sale, and gave to the same trustees the residue of her personal estate, and the proceeds of the sale of her said real estate, upon trust as to two-sixteenths thereof to pay the same unto her nephew Stephen Love, and as to two other sixteenths thereof upon such trusts for the benefit of her niece Ellen Love and her issue as were therein declared of the said sum of £1,000 bequeathed for her benefit.

Elizabeth Love made a codicil dated the 27th of August, 1872, as follows: "This is a codicil to the last will and testament of me, Elizabeth Love, of Filstone, in the parish of Shoreham, in the county of Kent, spinster, which will bears date the 9th of February, 1872. I do hereby revoke and make void every gift, devise, appointment, and bequest made by me in and by my said will to or in favor of my niece Ellen Love and my nephew Stephen Love respectively. I confirm my said will in all other respects."

Elizabeth Love made a second codicil dated the 14th of April, 1873, as follows: "This is a codicil to the last will 232] and testament of me, Elizabeth Love, of the parish of Shoreham, in the county of Kent, spinster. Whereas since the date of my said will I have purchased two messuages with the outbuildings, gardens, and premises thereto belonging, situate and being Nos. 5 and 6 Camden Villa, London Road, in the parish of Sevenoaks, in the county of Kent. And I have contracted to purchase two other messuages with the outbuildings, gardens, and premises thereto belonging, situate and being Nos. 9 and 10 Granville Road, in the said parish of Sevenoaks, but the purchase whereof has not yet been completed. Now I devise the said four messuages and premises respectively, with the appurtenances and all other the real estate, if any, which I have acquired or contracted to purchase since the date of my said will unto my brother Samuel Love, my brother-in-law John Tribe, my nephew Frank Green, and William Francis Holcroft, the trustees and the executors named in my said will, and to their heirs, to, upon, and for the several uses, trusts, intents, and purposes in my said will expressed and contained of and concerning my residuary real estate (other than the messuage, cottage, and premises thereby devised to my said brother Samuel Love for his life as therein mentioned). And I declare that the produce of the sales of the messuages and hereditaments hereby devised as aforesaid shall fall into and form part of my residuary and personal

estate thereby bequeathed and shall be divided in the same proportions and for the benefit of the same parties as in my will is expressed and declared of and concerning my said residuary personal estate, and that each share respectively shall be subject to the same trusts, restrictions, and limitations over in all respects as the original share thereby bequeathed, and as if the share hereby bequeathed had actually formed part of my said residuary personal estate disposed of by my said will. In other respects I confirm my said will."

Elizabeth Love died in September, 1873, and this action was brought for the administration of her estate. Two of the questions argued on the hearing were, whether the second codicil revoked the first codicil; and if not, whether the messuages comprised in the second codicil would go according to the terms of the residuary devise in the will alone, in which case Stephen Love and Ellen Love would take each two-sixteenths, or would go according *to the will [233 and first codicil together, in which case Stephen Love and Ellen Love would take nothing.

North, Q.C., and *G. E. Cruikshank*, for the plaintiff: The effect of the second codicil is to prevent the shares of Stephen Love and Ellen Love from lapsing, and to give the property in twelfths and not in sixteenths. As to the effect of a second codicil on a first codicil: *Crosbie v. MacDowal* (1); *Aaron v. Aaron* (2); *Gordon v. Lord Reay* (3); *Burton v. Newbery* (4); *Pigott v. Wilder* (5); *Farrer v. St. Catherine's College* (6).

Cobkson, Q.C., and *Macnaghten*, for other parties.

C. Browne, for the heir of the testator.

Kekewich, Q.C., and *Badcock*, for Ellen Love: No doubt the codicil may refer to another codicil, but it must be clear. The law has been altered by the Wills Act, s. 54.

North, in reply: The second codicil is not inoperative, and has the effect of making the property go in twelfths. Even if that is not so, the testatrix may have thought she had good reason to make the codicil.

June 18. *Fry*, J., after stating the facts of the case, continued:

It appears from the statements made by the plaintiff, which are not disputed by the defendants, that the purchase, a recital of which is contained in the second codicil, had

(1) 4 Ves., 610.

(2) 3 De G. & Sm., 475.

(3) 5 Sim., 274.

(4) 1 Ch. D., 234; 15 Eng. R., 713.

(5) 26 Beav., 90.

(6) Law Rep., 16 Eq., 19; 6 Eng. R., 615.

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been made by the testatrix after the 9th of February, 1872, the date of her original will, but before the 27th of August, 1872, the date of her first codicil. This being so, it appears to me that the second codicil must be read as if the last will and testament there referred to had been described by its 234] proper date, and as if the testatrix had *declared that the second codicil was a codicil to her last will and testament of the 9th of February, 1872.

Upon this state of facts two questions have been raised before me. First, did the second codicil revoke the first codicil, and revive the original will in all its dispositions, and consequently restore Ellen Love and Stephen Love to the position of legatees under that will? Secondly, if this were not the case, was the real estate specifically mentioned in the second codicil devised upon the terms of the original will unaffected by the second codicil?

Both these questions must be determined by the answer to a third question, which is this: Assuming a testator to have made a will, to have made a first codicil modifying that will, to have made a second codicil describing his will by the date which the original instrument bore, and confirming that will, but observing an absolute silence with regard to the first codicil, what is the effect of the second codicil? Does it revive the first will as it originally stood, or does it confirm the original will as modified by the first codicil?

The general principle I take to be clear. On the one hand, where a testator in a codicil uses the word "will" abstractedly from the context, it will refer to all antecedent testamentary dispositions which together make the will of the testator, and consequently where the testator by a codicil confirms in general terms his will or his last will and testament, the will, together with all codicils, is taken to have been confirmed. "The will of a man," said Lord Penzance in *Lemage v. Goodban* (1), "is the aggregate of his testamentary intentions so far as they are manifested in writing, duly executed according to the statute." On the other hand, it is equally clear that the testator may by apt words express his intention to revoke any codicil already made, and to set up the original will unaffected by any codicil. The question, therefore, which I have to consider is whether the reference to the date of the original will is an indication of the intention to deprive all instruments other than the original will itself of any force—in fact, whether such a reference to a will effects a revocation of the antecedent codicils. To this inquiry a series of cases appears to afford a

(1) Law Rep., 1 P. & M., 57.

clear negative answer. The first to which I desire to refer *is the case of *Crosbie v. MacDowal* ⁽¹⁾. There the [235 testator made a will and five codicils, and a question arose as to the effect of the fifth codicil upon the fourth codicil, by which certain annuities had been given. The fifth codicil recited the making of the will and the date which it bore, substituted one executor in the place of another, was silent as to all antecedent codicils, and concluded by confirming the testator's said will in all other respects. The then Master of the Rolls held that the fourth codicil was not revoked by the fifth. This decision rested upon two propositions. The first, that if a man ratifies and confirms his last will he ratifies and confirms it with every codicil that has been added to it. The second, that the ratification of a will described by its date is a ratification of the will as modified by the codicils, and therefore does not revoke the codicils which were made between the date of the will and the confirming codicil. In the case of *Smith v. Cunningham* ⁽²⁾ a similar question arose. There the testator made first a will, then five codicils in succession, then a sixth codicil, by which he confirmed and republished his will and two codicils describing the will, and two codicils by the dates which they respectively bore, and it was held that the sixth codicil did not effect a revocation of the three unmentioned codicils. The court held, in the first place, that the intention to revoke must be clear and unequivocal; in the second place, that no clear inference in favor of the revocation arose from the language of the sixth codicil; and, thirdly, that, looking at all the circumstances to ascertain the intention of the testator as to what instruments should operate as and compose his last will, as the Court of Probate was in the habit of doing (*Greenough v. Martin* ⁽³⁾), there was no intention to revoke. In *In the Goods of De la Saussaye* ⁽⁴⁾, a case which came before Sir James Hannen in the year 1873, a similar point arose. The testator there first made a will, he then made three codicils in Spain, he then made a codicil in England by which he revoked certain dispositions contained in his will, which he described as executed in London on the 12th of March, 1869, and concluded by confirming the dispositions contained in his will of the 12th of March, 1869, in whatever did not clash or interfere *with the con- [236 tents of that codicil. The question arose whether the express reference to the will of the 12th of March, 1869, im-

⁽¹⁾ 4 Ves., 610.⁽²⁾ 1 Add., 448.⁽³⁾ 2 Add., 239.⁽⁴⁾ Law Rep., 3 P. & M., 42.

plied an intention on the part of the testator to revoke his Spanish codicils. The court held that it did not, on the ground that those codicils were to be deemed parts of the will, and were themselves confirmed by the ratification of the will of which they were modifications.

In each of the cases which I have hitherto considered, as well as in the case before me, the earlier codicil in question had a force of its own. It must prevail unless it be revoked by the subsequent codicil. But there is a class of cases closely akin to those I have been considering, but different in this respect, that in them the earlier codicil has no proper vigor of its own, but derives its force, if at all, from the later codicil. The cases of the latter class are not uniform. First in point of date comes *Gordon v. Lord Reay* ⁽¹⁾; there the testator made a charge on real estate by an unattested codicil, and by a subsequent codicil referred to his will by its date, and confirmed his will; and the Vice-Chancellor of England held that the first codicil was a part of the will, that the second codicil was a republication of the will, and consequently of the first codicil which was a part of it. In the case of *Aaron v. Aaron* ⁽²⁾, the testator duly made a will; he then made a codicil not duly attested varying the dispositions of his will; he then duly made a second codicil by which he recited that he had duly made and executed a will and codicil, describing them by their respective dates, and then, after certain modifications in his will, ratified and confirmed his "said will" in all other particulars thereof, saying nothing as to the ratification of his first codicil. The court held that the intention of the second codicil, as collected from the whole of it, was to confirm the first codicil so as to give effect to it as if it had been duly attested by three witnesses. The recital of the first codicil as having been duly executed was a strong circumstance in this decision.

So far the current of authority seems to run smoothly. But in the recent case of *Burton v. Newbery* ⁽³⁾, the present Master of the Rolls took a different view. There the testator made a *will before the Wills Act, under which A. and B. took shares of the proceeds of his real estates. By a codicil made after the Wills Act, he devised subsequently acquired realty on the trusts of his will. This codicil was attested by A. and B., who consequently were incapable of taking their shares under the codicil. By a second codicil, described as a codicil to his will dated the 1st of April, 1839, he gave a pecuniary legacy, and said

⁽¹⁾ 5 Sim., 274.

⁽²⁾ 3 De G. & Sm., 475.

⁽³⁾ 1 Ch. D., 234; 15 Eng. Rep., 713.

nothing as to his first codicil. In this state of facts the Master of the Rolls held that the second codicil did not operate as a republication of the first. The only reference, he said, was to a will bearing date a certain day, that is, as I understand it, to a described instrument which excludes instruments of subsequent dates. It appears to me that the Master of the Rolls intended by this judgment to decide only that where recourse is had to a subsequent codicil to give vigor to an earlier one, a mere reference to the will by its date will not operate upon the earlier and inoperative codicil so as to set it up, and that he did not intend (as has been argued before me) to lay down that the confirmation of a will referred to by its date would revoke a pre-existing and valid codicil. Accordingly, I find him dissenting from the case of *Gordon v. Lord Reay* (*), but referring without disapproval to the earlier case of *Crosbie v. MacDowal* (*).

The two classes of cases differ essentially. In the one the earlier codicil has a proper force of its own; in the other the earlier codicil must be left to itself fail. In the one class the question is, does the later codicil revoke the earlier and operative one; in the other class you inquire, does the later codicil set up the earlier and inoperative one? To the one class of cases the principle applies that a clear disposition is not to be revoked except by clear words; to the other class this principle has no application: *Doe v. Hicks* (*); *Farrer v. St. Catherine's College* (*).

I conclude, therefore, that the decision of the Master of the Rolls in *Burton v. Newbery* (*) does not touch the case before me, and was not intended to touch the class of cases to which it belongs.

The case of *Crosbie v. MacDowal* and the cases which have followed *it appear to me to be right in principle. [238] The character of a codicil is very peculiar. Its nature is not substantive but adjective. It is, as Mr. Justice Blackstone describes it (*), "a supplement to a will, or an addition made by the testator, and annexed to and to be taken as part of a testament." A reference to the will therefore in itself carries with it a reference to that which is merely a supplement to or annexed to the will itself; and the mere fact that the testator describes the will by a reference to its original date, does not seem to me sufficient to exclude the inference that the will referred to is the will as modified by the codicils.

(*) 5 Sim., 274.

(*) 4 Ves., 610.

(*) 8 Bing., 475.

(*) Law R., 16 Eq., 19; 6 Eng. R., 615.

(*) 1 Ch. D., 234; 16 Eng. R., 713.

(*) 2 Bl. Com. 450, Kerr's ed.

This peculiar character of codicils is well illustrated by two cases in the ecclesiastical courts. In the case of *Wade v. Nazer* (¹), the testator executed first a will and then a codicil and then re-executed his will, and it was held that the re-executed will took effect subject to the codicil, on the ground that it was a part of the will which was so re-executed. In the case of *Upfill v. Marshall* (²), the testator made a will, then a codicil, altering certain of its dispositions, and then republished his will. It was held that the codicil was not revoked by the republication of the original will, and that for the same reason the codicil was a part of the republished will.

One other argument remains for consideration. According to the construction which I place upon the second codicil, the property expressed to be devised by it passed in sixteen shares in accordance with the will of the testator. I cannot yield to the argument pressed upon me that even if the first codicil was not revoked, the second codicil passed the after-acquired property on the trusts of the original will. If I am right in thus holding, the codicil operated nothing unless it be held to have restored the original will by revoking the first codicil, in which case it would have had the very material operation of restoring Ellen Love and Stephen Love to their position of legatees. The codicil ought, it may be suggested, to be construed so as to have some effect, and there being no other effect for it, it ought to be so construed as to revoke the first codicil, and thereby admit Ellen Love and Stephen Love to the benefit of the original 239] dispositions intended for them. *This argument ought not, I think, to prevail, because it appears to me to be at variance with the expressed intentions of the testatrix. She recites in the codicil the circumstance which induced her to execute it, namely, the purchase of property since the date of her will, and the contract for purchase of other properties. She appears to have thought that this rendered it desirable to execute a codicil to her will, but it is impossible to suppose that if the real object had been to restore Ellen Love and Stephen Love to their original position as legatees, such an intention would not have been hinted at in the recitals which are introduced into the second codicil for the very purpose of explaining its object; I notice the argument, therefore, only for the purpose of rejecting it. The result is, that in my judgment the second codicil was absolutely inoperative. The will and first codicil must take effect with regard to the whole of the real estate of which

(¹) 1 Rob. Ecc., 627.

(²) 3 Curt., 636.

the testatrix died possessed, whether acquired before or after the date of her original will.

Solicitors: *Crowder, Anstie & Vizard; Makinson & Carpenter; Monckton, Long & Co.*

[9 Chancery Division, 239.]

FAY, J., June 24, 1878.

KIRKWOOD V. WEBSTER.

[1876 K. 16.]

Costs—Taxation—Party and Party—Costs of three Counsel—Copies of Shorthand Writer's Notes of Evidence.

In a case of considerable complication, in which charges of fraud were made against the defendant, judgment having been given for him with costs, he was allowed the costs of employing three counsel, though the Taxing Master had only allowed the costs of two.

The rule laid down by Turner, L.J., in *Pearce v. Lindsay* (¹), explained.

The costs of making for the use of counsel copies of a shorthand writer's notes of evidence taken at the trial will not be allowed as between party and party, unless a special direction to that effect is given by the judge at the trial.

(¹) 1 D. F. & J., 573.

[9 Chancery Division, 250.]

C.A., June 19, 1878.

***BOYNTON V. BOYNTON.**

[250]

[1871 B. 175.]

Costs—Legal Personal Representative—Revivor.

A plaintiff died after having obtained a decree with costs, and having appointed one of the defendants, who had a concurrent interest with her, her executor. Two others of the defendants served notice of appeal. The executor after this obtained the common order of revivor. The appeal afterwards came on to be heard, and the bill was dismissed with costs as against the appellants:

Held, that the executor had adopted the suit for all purposes, and that the costs were payable by him personally, and not merely out of the estate of the original plaintiff.

THIS was a suit by Lady Boynton to have it declared that a settlement of the 30th of March, 1871, executed by her was obtained by undue influence, to have the indenture delivered up to be cancelled, and to have the costs of the suit paid by the defendant, G. H. L. Boynton. Notice of motion for decree was given on the 11th of June, 1872, and on the 13th of November, 1876, Vice-Chancellor Hall made a decree declaring that the plaintiff's execution of the settlement was obtained by undue influence, and that the settlement was void, and ordering it to be delivered up to be cancelled. The defendant, G. H. L. Boynton, was ordered to pay the plaintiff her costs of the suit.

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On the 26th of June, 1877, the plaintiff died, having appointed Charles Boynton, one of the defendants to the suit, her executor, and he proved the will on the 14th of September, 1877. He had been a party to the suit as having a concurrent interest with the plaintiff in having the settlement of the 30th of March, 1871, set aside.

On the 6th of November, 1877, two of the defendants served on Charles Boynton and the other defendants notice of appeal from the decree.

On the 19th of November, 1877, Charles Boynton, as executor of the plaintiff, obtained the common order that he might be at liberty to carry on and prosecute the suit 251] against the other *defendants in like manner as the plaintiff might have done if she had not died.

On the 16th of April, 1878, the Court of Appeal decided that the settlement in dispute was valid, and that the bill ought to have been dismissed with costs as against the defendants who opposed the decree.

The case now came before the Court of Appeal on an application to vary the minutes of the order of that court, the question being whether it ought to be so worded as to make the costs payable by Charles Boynton out of the assets of Lady Boynton only, or to make them payable by him personally, leaving him to recoup himself out of her estate, if any.

W. Pearson, Q.C., and Everitt, for Charles Boynton: The costs ought not to be payable by the executor personally. The decree ought to have the same operation as if it had been made in Lady Boynton's lifetime, dismissing her bill with costs, in which case the costs would only have been payable out of her estate. If there had been a revivor before judgment in the court below, we should not dispute the liability of the executor to pay costs personally.

Dickinson, Q.C., and Maclean, contra: Charles Boynton has adopted the suit, and must be liable to costs as if he had instituted it: Daniell's Chancery Practice ('); *Horlock v. Priestley* (').

W. Pearson, in reply.

JAMES, L.J.: I am of opinion that the order ought to give costs against Charles Boynton personally, and that it is impossible to distinguish this case from *Horlock v. Priestley*. It seems to me that the general principle is this, that if a party to a litigation dies at any stage of it, his legal personal representative must then consider whether he will or will not adopt the litigation. It does not signify

(') Pages 1244, 1284.

(') 8 Sim., 621.

in what stage the litigation is—whether the death takes place before *the original hearing or before the [252 rehearing in the Court of Appeal; it is for him to say whether he will or will not further prosecute the matter. If he elects to go on, it is impossible to draw a distinction as to the stage at which the suit has arrived when he elects so to continue it; if he elects to continue it, he must pay the costs like any other litigant, without prejudice to any right which he may have to get his costs out of the estate which he represents. It is impossible not to see that the order which Charles Boynton obtained to continue the suit was not wanted for the purposes of the appeal, but was wanted and was obtained by him for the purpose of enforcing for his own benefit that part of the decree which remained to be completed, that is to say, the part relating to those costs to which, as the decree originally stood, he was entitled. He adopted the suit, in my opinion, as completely as a legal personal representative could do. He has adopted with it all the consequences, and must pay the costs.

BRETT and COTTON, L.JJ., concurred.

Solicitors: *Johnson, Upton & Co.; Sharp & Ullithorne.*

See 3 Eng. Rep., 748 note; 12 Eng. Rep., 666 note; N. Y. Code of Civil Procedure, § 3246.

Where executors or administrators are substituted for a deceased defendant in a pending action, they are not entitled to presentation of the demand, under the provisions of 2 R. S., 88-90, relating to referring claims against estates of deceased persons; and section 41 of that statute does not prevent plaintiff from recovering costs against them if he continues the action and recovers judgment. Special application to the court for leave to enter judgment in such case is not necessary: *Tindall v. Jones*, 11 Abb. Pr., 258, 19 How. Pr., 489; *Merritt v. Thompson*, 27 N. Y., 225; *Benedict v. Coffe*, 12 N. Y. Leg. Obs., 262, 3 Duer, 609; *Mitchell v. Mount*, 17 Abb. Pr., 213; *Lemen v. Wood*, 16 How. Pr., 285; *Fort v. Gooding*, 9 Barb., 388; *Hamilton v. Homer*, 46 Miss., 378.

The case of *McCann v. Bradley*, 15 How. Pr., 79, is clearly not sound law.

Executors or administrators should sue in their representative character only, where the testator or intestate had a complete cause of action in his lifetime: *Woodruff v. Cook*, 14 How. Pr., 481.

An instrument in writing, made payable "to the estate of M. L., deceased," and not to any person or persons by name, is clearly not a promissory note under the statute. Whatever it may be considered, it is not a promise to pay the testator, for he is described as deceased. It can only be recovered upon as a promise to pay some other person or persons.

If it be regarded as a promise to pay the executors of the deceased, then there is no necessity for their suing in a representative capacity; and doing so, unnecessarily, they are, if defeated, liable to pay costs, without a special motion or order for that purpose; and the defendant may enter up judgment against them for the costs, as of course: *Lyon v. Marshall*, 11 Barb., 242; *Bostwick v. Brown*, 15 Hun, 308.

In an action by an executor to recover the possession of personal property belonging to the testator, where the alleged cause of action arose when the defendant refused to give the property on the demand of the plaintiff; held that such a case is not necessarily prosecuted by the plaintiff in his representative character. On the contrary, executors and administrators should sue

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in their own right in such case: Woodruff v. Cook, 14 How. Pr., 481.

Executors must sue in their representative character, to exonerate them from the payment of costs, where defendant obtains judgment for costs. Merely describing themselves as executors at the commencement, and the declaration throughout showing that the cause of action accrued to themselves and not to the testator, is not sufficient: In the matter of the Justices, etc., 1 How. Pr., 200.

In an action against executors and administrators, to recover for services rendered to them *as such*, the plaintiff, on recovering judgment, is entitled to costs against the defendants, and may enter judgment against them without special application to the court for the allowance of costs. They are only exempted from costs when sued upon demands which existed against the decedent in his lifetime, and not upon any claim created since his decease by or under the supervision of the executors: Smith v. Patten, 9 Abb. (N.S.), 205.

No costs are allowed against a plaintiff administrator personally, in an action of trover, when the alleged conversion was in the testator's lifetime, but it is otherwise when the conversion is subsequent to the testator's decease, and the action might have been maintained in the plaintiff's own right: Fox v. Fox, 5 Hun, 53.

Under § 317 of the Code (which repeals § 17, tit. 1, ch. 10, part 3, 2 R. S. 615, on the same subject), if an executor or administrator fails in an action prosecuted by him in his representative capacity, the defendant recovers costs as matter of course, to be collected out of the estate represented, but he cannot

enter judgment for costs against the plaintiff *personally*, unless the court directs the same to be paid by the plaintiff personally, "for mismanagement or bad faith in such action": Woodruff v. Cook, 14 How. Pr., 481.

There must be a direction of the court to authorize a defendant to enter judgment for costs against an executor or administrator *personally*, in an action not necessarily prosecuted in the right of his testator or intestate (12 How., 305): Woodruff v. Cook, 14 How. Pr., 481.

Where a verdict is had at the circuit, and the court directs the exceptions to be heard in the first instance at general term, if the general term direct judgment for the plaintiff, he is entitled to costs of the general term, as well as costs for previous proceedings in the cause, even though the verdict be reduced. It makes no difference that the defendant is sued as executor: Duff v. Wardell, 10 Abb. (N.S.), 84.

Where an attorney has, under the employment of an executor, rendered professional service for the estate represented by such executor, and afterwards the will has been set aside and another person has been appointed to represent the estate as administrator, he will be liable to pay for such service out of the estate: Nave v. Salmon, 51 Ind., 159.

A widow and children were entitled under a will to support out of the testator's property, and goods were supplied for this purpose to the executors:

Held that the creditor who advanced the goods had no charge against the estate, but must proceed against the executors personally: Campbell v. Bell, 16 Grant's (U.C.) Chy., 115.

[9 Chancery Division, 252.]

C.A., June 20, 1778.

Ex parte DRESSLER. *In re* SOLOMON.

Leasehold Property of Bankrupt—Omission of Trustee to disclaim—Possession taken by Trustee—Personal Liability of Trustee for Rent—Jurisdiction of Court of Bankruptcy—Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), ss. 20, 23, 24, 35, 72.

A trustee in bankruptcy who takes actual possession of leasehold property of the bankrupt, and does not, when called upon by the landlord so to do, disclaim the lease in the way provided by sect. 23 of the Bankruptcy Act, 1869, is personally liable for the rent which accrues due after he takes possession.

Sect. 35 of the act only gives the landlord a right of proof for the proportionate

part of the rent up to the date of the adjudication, but does not relieve the trustee from his personal liability.

Seemle, the court could not have decided this question in the absence of the submission of the parties.

THIS was an appeal from a decision of Mr. Registrar Pepys, acting as Chief Judge in Bankruptcy.

*Joseph Solomon, a dealer in works of art, occupied a shop, No. 47 South Audley Street, as tenant to J. A. Dressler, at a yearly rent of £130, payable quarterly. On the 10th of February, 1878, Solomon filed a liquidation petition. The first meeting of the creditors was held on the 6th of March, when a liquidation by arrangement was resolved upon, and D. E. Solomon and W. L. Clifton Browne were appointed trustees. At this time the quarter's rent due at Christmas, 1877, had not been paid. The trustees took actual possession of the shop, and the debtor's effects in it. Dressler put in a distress for the Christmas rent, and the trustees thereupon paid it to him. Before the 25th of March all the debtor's effects were removed from the shop, they having been sold by the trustees on the 21st of March. Dressler was therefore unable to distrain for the quarter's rent due the 25th of March. On the 11th of April his solicitor wrote to the trustees' solicitor, "Do your clients, the trustees, intend to keep possession of the premises in South Audley Street? My client will certainly look to them for the rent, and I shall be glad if you will let me have a check for the rent due 25th of March last as promised." On the 13th of April the key of the shop was sent to Dressler, and was accepted by him, but the rent was not paid. On the 14th of April the trustees' solicitor wrote to Dressler's solicitor, saying that Dressler must prove for the rent due at Lady Day, and rank with the other creditors. The trustees executed no written disclaimer of the lease. Further correspondence took place, but the rent was not paid, and on the 22d of August, 1877, Dressler commenced an action in the Exchequer Division against the trustees for the Lady Day rent. On the 11th of December, 1877, the trustees applied to the Court of Bankruptcy for an order restraining further proceedings in the action. Upon the hearing of this application by Mr. Registrar Pepys, acting as Chief Judge, Dressler's counsel stated that he was willing that the question in the action should be determined by the Court of Bankruptcy, and "Dressler by his counsel, consenting that an injunction shall be granted restraining the continuance of the action, and the trustees submitting to the jurisdiction of the court in respect of the matters in difference between

them and Dressler," it was by consent ordered that all 254] further proceedings in the action should be *stayed, and that the costs of all parties of the action and of the application should be reserved to be dealt with thereafter by the court, and all parties were to be at liberty to apply to the court as they might be advised. After this Dressler applied to the court for an order that the trustees should personally, but with liberty afterwards to recover the same out of the estate, pay him the sum of £32 10s., the quarter's rent of the shop due at Lady Day, 1877, and the costs of the action and of the applications to the Court of Bankruptcy. On the 2d of April, Mr. Registrar Pepys, acting as Chief Judge, refused this application, and ordered Dressler to pay the costs of it, as well as the costs reserved by the order of the 11th of December. Dressler appealed. The appeal was heard on the 20th of June, 1878.

Roxburgh, Q.C., and *E. C. Willis*, for the appellant: The trustees are personally liable for the quarter's rent. The Court of Bankruptcy has jurisdiction to decide the question: Bankruptcy Act, 1869, ss. 20, 72. At any rate, if there is any difficulty as to jurisdiction, it is removed by the submission of the parties.

JAMES, L.J.: The personal liability of the trustees is not a matter relating to the administration of the debtor's estate. Do the trustees wish the action to proceed?

Patchett, Q.C., and *Tatlock*, for the trustees: We desire to have the question decided by this court. The trustees remained in possession only for the purpose of realizing the debtor's assets. They are not personally liable for the rent; the landlord's only remedy is against the estate of the debtor: Bankruptcy Act, 1869, ss. 23, 24, 31; *Ex parte Llynvi Coal and Iron Company*(¹); *Ex parte Davis*(²). The acceptance of the key by the landlord operated as a disclaimer under sect. 23.

[JAMES, L.J.: In *Ex parte Davis* the question was as to a personal contract of the bankrupt. There was no legal liability on the part of the trustee. Here, if the trustees are liable, it is as assignees in possession of the land. The liability to the rent *follows the possession. Under the old law, if an assignee in bankruptcy took possession of the bankrupt's leasehold property he was considered to have elected to take the lease.]

Under the old law the estate remained in the bankrupt until the trustee had elected, now it vested in the trustee immediately on the adjudication. Why should the trustee

(¹) Law Rep., 7 Ch., 28.

(²) 3 Ch. D., 463; 18 Eng. R., 621.

be personally liable for the rent for the period between the adjudication and his appointment? The logical result of the argument is that the Registrar, who is trustee until a trustee is appointed by the creditors, becomes personally liable.

[JAMES, L.J.: The effect of the old law is shown by the observations of Lord Ellenborough in *Hanson v. Stevenson* (*). Was that law in any way altered until sect. 23 of the present act was passed?

BRETT, L.J.: And is not the result of the decision in *Ex parte Davis* (†) this, that, if sects. 23 and 24 are not strictly followed, the legal rights remain as they were under the old law?]

What is a trustee in bankruptcy to do? He must have time to make up his mind whether he will disclaim or not.

[JAMES, L.J.: He need not take possession.]

Sect. 35 gives the landlord a right to prove for the proportionate part of the quarter's rent up to the date of adjudication, i.e., in the case of a liquidation by arrangement, the date of the appointment of the trustee. The trustees, therefore, are at any rate only personally liable for the proportionate part of the rent from the 6th to the 25th March. There cannot be a right of proof, and also a personal liability on the part of the trustee.

JAMES, L.J.: I am of opinion that the order of the Registrar cannot be sustained. The trustees may not have been well advised in the course which they have adopted, but they have not proceeded in the way pointed out by sects. 23 and 24 of the act; they have not executed any disclaimer of the lease in writing. What we decided in *Ex parte Davis* was that we could not enlarge the words *of those [256 sections or of sect. 25 so as to alter pre-existing legal rights any further than they are actually altered by those sections. What, then, were the legal rights of an assignee in bankruptcy with regard to leasehold property of the bankrupt before the passing of the Bankruptcy Act, 1869? Under the old law, if the assignee elected to take possession of the bankrupt's leasehold property he became, by reason of his privity of estate, personally liable for the payment of the rent. He could get rid of his liability by assigning the lease to a pauper, but, if he took possession of the property, he made himself liable to pay the rent. It is not contested in the present case that actual possession of the property was taken by the trustees, and, indeed, it is manifest from the correspondence that the trustees knew that they were in possession, and that they had actually promised to send a

(*) 3 Ch. D., 463; 18 Eng. R., 621.

(†) 1 B. & A., 303, 307.

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check for the rent which became due in March. That being the legal effect of possession being taken by the trustees, the result is that they are liable as assignees of the estate to pay the rent, and, as between themselves and the landlord, they are personally liable, though they are entitled to an indemnity out of the debtor's assets. And no injustice will be done to them, for they ought to have retained out of the assets a sum sufficient to answer the rent. There will be an order, therefore, for payment of the quarter's rent to the appellant, and he must have his costs.

BRETT, L.J.: I take the facts to be that, after the appointment of the trustees, and during the currency of the quarter in respect of which the rent is claimed, the trustees took actual possession of the leasehold premises, and that they remained in possession until after the quarter had expired. After the letter of the 11th of April, by which the trustees were in substance asked whether they intended to disclaim, they sent the key of the premises to the landlord, and he accepted it. But they never executed any disclaimer of the lease in writing. The question is whether the trustees are personally liable for the rent of the March quarter. I think that they are. Under the old law they would have been personally liable, on the ground that, by taking actual possession of the property, they had elected to accept the [257] lease, and had adopted the assignment *which had been made to them. Is there anything in sects. 23 and 24 of the Bankruptcy Act, 1869, to take away that liability? Sect. 23 is in relief of the trustee, but, in order to obtain the benefit of it, he must bring himself within its terms. If the trustee wishes to obtain the benefit of sect. 23, which he may do although he has taken actual possession of the property, he must disclaim the lease by a writing under his hand; if he does not do this, he is not entitled to the relief given by the section. He may execute the disclaimer at any time, except so far as he is prevented by sect. 24. After an action had been brought for the rent he might, at any rate within twenty eight days from the issuing of the writ, disclaim, and I am disposed to think that the action could not then be maintained. At all events he could disclaim at any time before action. In the present case the notice referred to in sect. 24 was given by the landlord in the letter of the 11th of April. Then the trustees did that which would work a surrender of the lease at law, by sending the key to the landlord, which he accepted. That effected a surrender of the lease by operation of law, and not by virtue of a disclaimer under the act. What is the real effect of sect. 24?

It appears to me that if a trustee takes possession of the bankrupt's leasehold property, the landlord may give notice to him, and he must then make up his mind whether he will disclaim the lease or not. Sect. 24 is intended to limit the time within which the trustee must exercise his right to disclaim to twenty-eight days after the receipt of the notice, and if he lingers over the twenty-eight days he cannot disclaim at all under sect. 23, unless the court has extended the time under the power given to it by sect. 24. The trustee then remains personally liable for the rent during the whole of the remainder of the lease, unless the landlord chooses to release him, as has been done in the present case. Sect. 24 confers no right on the trustee; it only limits the right given to him by sect. 23. If he does not follow the course prescribed by sect. 23 his liability remains as it was under the law which existed before the act of 1869. And that is really the force of the decision in *Ex parte Davis* ⁽¹⁾. Lord Justice Mellish says ⁽²⁾, "Neither the 23d nor the 24th section, however, enacts anything as to what is to be the effect if the *trustee does not disclaim," i.e., if he [258 does not disclaim in the way pointed out by sect. 23. If he does not, neither sect. 23 nor sect. 24 enacts anything as to the trustee's liability, which is left as if those sections had not been passed, i.e., he remains personally liable for the rent. This construction of the act will not, I think, work any hardship. The landlord cannot force the trustee to disclaim except within the twenty-eight days, and the trustee is further protected by rule 28 of the Bankruptcy Rules, 1871, which provides that he is not to disclaim a lease without first obtaining the leave of the court. He cannot, therefore, be made personally liable on the lease except upon fair and reasonable terms. A trustee ought to make up his mind speedily whether he will disclaim a lease or not.

COTTON, L.J.: I also am of opinion that the order of the Registrar cannot be sustained. Before I give my reasons for so thinking I must observe that we are not now deciding that without the submission of the parties we could entertain this appeal. I say this in order that it may not be assumed in any future case that without such a submission the Registrar would have had any jurisdiction to entertain the application to him, or that this court would have had any jurisdiction to entertain the appeal.

Upon the evidence I think it is clear that the trustees were in possession of the property up to the 13th of April, and, that being so, it is not disputed that under the old law

⁽¹⁾ 3 Ch. D., 463; 18 Eng. R., 621.

⁽²⁾ 3 Ch. D., 474; 18 Eng. R., 630.

an assignee in bankruptcy would have been personally liable for the rent. Is there, then, anything in the act of 1869 to relieve the trustee from this liability? Under sect. 23 he can entirely relieve himself by doing that which is pointed out by that section. Has that been done in the present case? I think not. The trustee sent the key of the premises to the landlord, and he accepted it, and that amounted by operation of law to a surrender of the lease as from that date. But can it be said to have been effectual under sect. 23? That section gives to the trustee a special statutory power, but it must be followed strictly. When certain specified things are done, then and then only can the specified result follow. It cannot be said in the present case that 259] the trustees have any personal equity *as against the landlord. Sect. 24 gives the trustee no greater power than was given to him by sect. 23, but whereas the power given by sect. 23 was unlimited as to time, sect. 24 entitles the landlord to call upon the trustee to exercise the power within a limited time. In the present case, the power not having been exercised by the trustees in the mode prescribed, they remain liable for the rent as they would have been under the old law. Sect. 35 was relied upon to show that they are only liable for a part of the quarter's rent proportioned to the time during which they were in possession. But, in my opinion, that section simply gives to the landlord a right of proof which he would otherwise not have had; it in no way relieves the trustees from the personal liability which would have attached to them under the old law for the whole quarter's rent.

Solicitor for landlord: *H. W. Christmas.*

Solicitor for trustees: *W. J. Foster.*

See 15 Eng. Rep., 745 note; Matter of Sneezum, 18 Eng. Rep., 631.

As to apportionment of rents in New York, see Laws 1875, chap. 542, p. 616.

A testator left all his property, both real and personal, to his wife, the defendant, and appointed her sole executrix. At the time of his death he was the lessee of certain premises, the lease having one year to run. After his death, the defendant continued to occupy a portion of the demised premises as a place of business, and sublet the remainder thereof for her own profit:

Held, that by these acts she elected to hold the premises as legatee and not as executrix, and that she was per-

sonally liable for the rent subsequently accruing.

An executor is liable, as such, upon the covenants contained in a lease executed by his testator, whether he enters into possession of the demised premises or not; but if he does enter into possession, he thereby becomes personally liable upon such covenants as an assignee of the lease: *Howard v. Heinerschit*, 16 Hun, 177.

The assignment of a lease by the lessor entitles the assignee to sue the lessee in his own name on the covenants in the lease; and an assignment by the lessee of his right, title and interest in the lease, does not exempt him from liability on his covenant to pay

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rent, although the assignee of the lessor assents to the latter assignment: *Pfaff v. Golden*, 126 Mass., 402.

A lessee of land, who has not paid the rent reserved in the lease, cannot maintain an action against an assignee of the lease for such rent: *Farrington v. Kimball*, 126 Mass., 313.

An action for use and occupation does not lie against a principal where there is an outstanding lease in the name of the agent.

In such case there must be proof of an assignment of the lease in writing by the agent to the principal, or proof of a surrender of the lease by the agent and its acceptance by the landlord, before he can recover: *Kiersted v. Orange*, etc., 55 How. Pr., 51.

May 25, 1874, plaintiff leased certain premises to one Sternbergh for five years. In June, 1874, Sternbergh assigned the lease, subject to the rents and conditions thereof, to L. & S., who entered into possession and paid the rent in the name of Sternbergh. Subsequently Sternbergh assigned to the plaintiff all his claim against L. & S. for all accruing rents from the date of such assignment.

Held, that these facts established a privity of contract between the plaintiff and L. & S., and that an action would lie by the former against them to recover the rent reserved by the lease: *Marshall v. Lippman*, 16 Hun, 111.

A lease was made to A. who formed a copartnership with B. for a term exceeding the demised term, and the firm occupied a part of the demised premises (the rest having been sublet by A. before the partnership with B.) until November 18, 1875, when it was dissolved. The firm paid the rent up to November 1, 1875. On the dissolution, by arrangement between the partners, all debts owing to the firm were to be received by B., and all demands against it were to be presented to him for payment. B. gave public notice of this, and also that the business would be conducted in the name of B. at the demised premises. B. remained in the occupancy of the portion of the demised premises previously occupied by the

firm, until February 1, 1876, when he was dispossessed. B. collected of the sub-tenants, to whom A. had sublet the rents for their respective premises up to February 1, 1876, and deposited them in bank to his individual account. The lease to A. contained a clause against underletting without the written consent of the lessors. No consent was given to underlet to B. Held, in an action by the lessors to recover from B. the quarter's rent falling due February 1, 1876, the above facts appearing, without contradiction, *that he was holden as assignee*: *Kernochan v. Whiting*, 42 N. Y. Superior Ct., 490.

The assignee of a lease is liable for rent only, by reason of the privity of estate between him and the lessor, and this privity of estate is the assignee's right of possession under the assignment, and not his actual possession; and in an action by the lessor against the assignee for rent, the latter's liability is measured by the extent of his possessory right and not by the extent of his possession.

A lease was made to two persons, one of whom, by deed, assigned his undivided half interest therein to a third person, who entered into exclusive possession and occupied the whole of the leased premises; the lessor sued the assignee for the amount of rent reserved in the lease:

Held, that the assignee was liable only for an undivided half: *St. Louis, etc., v. Boatmen's Ins. Co.*, 5 Mo. App. Rep., 91.

Where a tenant has assigned his interest in the lease, and the landlord has recognized the assignee as his tenant and accepted rent from him, the lessee is no longer liable to the lessor in debt for the rent. The assignment and acceptance by the lessor destroys the privity between the lessor and lessee necessary to support the action of debt.

Although the assignment was by parol, yet it having become executed, and the assignee accepted by the landlord as a tenant, the statute of frauds can have no application, and the landlord is in no position to avail himself of the statute: *Bliss v. Gardner*, 2 Bradwell (Ills.), 422.

[9 Chancery Division, 259.]

V.C.M., May 16 : C.A., June 26, 1878.

GILBERT V. ENDEAN.

[1875 G. 22.]

*Evidence—Information and Belief—Interlocutory Application—Setting aside
Compromise.*

A decree was made by consent ordering the defendant to give a bond for payment of a certain sum to the plaintiff, and to deposit certain shares as security. Subsequently a compromise was come to by which the plaintiff agreed to accept a smaller sum on the ground of the poverty of the defendant. The plaintiff afterwards moved to enforce the decree, notwithstanding the compromise, on the ground that he had been induced to enter into the compromise by misrepresentation. In support of this it was shown that shortly before the compromise was signed the defendant's father, who was believed by all parties to be a man of property and had refused to assist the defendant, had died, which fact was known to the defendant's solicitor when the compromise was agreed to but was not known to the plaintiff's solicitor. The plaintiff's solicitor deposed that as "he was informed and believed" the defendant's father had died intestate, and the defendant had become entitled to a share of his estate, more than sufficient to meet all his liabilities. At the interview when the compromise was agreed to, the defendant's solicitor repeated the statement previously made as to the defendant's father having refused to assist him. An order having been made by Malins, V.C., giving the plaintiff leave to enforce the decree notwithstanding the compromise :

Held, on appeal, that the question whether the compromise was invalid ought to have been made the subject of a new action, and ought not to have been tried on a motion of this nature ; but that as the case had been argued on the merits in the court below without this objection being insisted on, the objection could not be taken in the Court of Appeal ; and the court being of opinion that the order was right on the merits, it was affirmed.

Upon a proceeding which, though interlocutory in form, finally decides the rights of the parties, evidence on information and belief is not admissible, and the party against whom it is adduced is not bound to contradict it ; but if in the court below he deals with the evidence as admissible, he may be precluded from objecting to it before the Court of Appeal.

THIS was a suit to set aside a sale made to the plaintiff by the defendant, Alfred Endean, of certain shares in two mining companies, and to obtain a return of the money, on the ground that the plaintiff had been induced to enter into the transaction by the misrepresentations of the defendant.

On the 16th of July, 1877, when the case came on for trial, a compromise was effected and a decree taken by consent that the defendant "do forthwith enter into a bond to pay on or before the 16th of August, 1877, to Joseph Gilbert, the amount of purchase-money for the Llanawot and Bampfylde shares in the pleadings mentioned, with interest at £5 per cent. per annum from the day of the purchase, and also £100 towards payment of the plaintiff's costs of this cause ; and do deposit with the plaintiff £1,000 of fully paid-up shares in the Bodedris Mining Company as security for the

above terms;" and the order went on to direct that the bill should be dismissed as against the defendant on those terms.

The amount thus made payable on the 16th of August, 1877, was £1,363.

On the 26th of March, 1878, an agreement was signed by which the plaintiff agreed to accept, and the defendant to pay in discharge of the defendant's liability under the above order, £500, payable by four instalments; the plaintiff retaining the shares to which the suit related, and the payment of the last two instalments being guaranteed by the defendant's solicitor; and in case of non-payment of any instalment, the plaintiff's rights under the decree were to revive. This agreement was negotiated by Mr. Greenip, the plaintiff's solicitor, and Mr. Gregory, the defendant's solicitor.

*When the first instalment of £125 fell due under [261] this last agreement, Mr. Gregory took the amount to Mr. Greenip, who refused to receive it on the ground that the fact of the defendant's father having died pending the negotiations had been concealed, and that the agreement was void as having been obtained by the suppression of a material fact.

The plaintiff then moved that he might be at liberty to proceed against the defendant under the order of the 16th of July, 1877, notwithstanding the subsequent agreement.

It was shown that the negotiations for the agreement of the 26th of March were commenced by Mr. Gregory on the ground that the defendant was almost penniless, and that his father, who was reputed to be a man of property, had refused to help him and would not help him. The terms were finally settled on the 25th of March. The defendant's father had died on the 23d, which fact was known to Mr. Gregory but not to Mr. Greenip. Mr. Greenip, by his affidavit in support of the motion, deposed as follows: "Prior to the negotiations on the 25th of March, that is to say, on the 23d of March, the defendant's father, Mr. J. P. Endean, died suddenly, and, as I am informed and believe, intestate, leaving his widow and the said defendant, his only child, him surviving, whereby the defendant became entitled to a share of his father's estate, I believe largely in excess of the sum required to meet the plaintiff's claim and his other liabilities in full. The fact that the defendant's prospects and position had improved was, I believe, well known to the said defendant and his solicitor at the time the latter called on me on the said 25th of March, and which fact, if it had been communicated to me, would have prevented my

accepting anything less than the full sum due to the plaintiff; but the excuse alleged by the defendant's solicitor of the defendant's ill health, and the desire of his friends therefore that the matter should be arranged, his remark that the defendant's father would not assist him, and my belief in the defendant's position as represented by his solicitor, induced me to accept the composition of £500 in settlement of the plaintiff's claim."

There was not any evidence that the defendant had succeeded to any property on the death of his father, nor that 262] the father *was a man of property, but it was admitted by the defendant's counsel that all parties believed him to be so at the time of the negotiations.

Mr. Gregory, in his affidavit, gave the following account of what passed on the 25th of March: "I called at the plaintiff's solicitors' office and saw the said Mr. Greenip, and after a preliminary reference to the negotiations between us I asked him what his terms for a settlement really were; and without any hesitation whatever he stated £500, payable as follows . . . and the plaintiff to retain the shares. I stated, as the fact was, that defendant had no security to offer, and whatever amount was paid would be with the help of friends, and that if security were insisted on a settlement would probably fall through. Ultimately, in further conversation, in which I stated (as I had on several occasions done before) that the defendant's father had refused to help the defendant, I inquired whether my undertaking that the two last instalments should be paid would be sufficient, and the said Mr. Greenip stated that he would be satisfied therewith." Mr. Gregory admitted that at the time of that interview he knew of the death of the defendant's father, but went on to say: "At the time I called on the said William Greenip on the 25th of March, 1878, it was not, nor is it now, well known to me that the defendant's position had improved by the death of his father, J. P. Endean, or that the said J. P. Endean had died intestate, or that the defendant became entitled to a share of his estate largely in excess of the sum required to meet the plaintiff's claim."

The motion was heard before Vice-Chancellor Malins on the 16th of May, 1878.

Glasse, Q.C., and *Grosvenor Woods*, for the plaintiff: Our contention is that the plaintiff was induced by misrepresentations made to his solicitor to agree to a reduction of the terms agreed upon for compromising the suit. If we had known that the defendant's father had died, and he had not been in the penniless state he was represented to be, we

should not have submitted to that reduction; we, therefore, ask that the original compromise entered into upon the trial of the action may be enforced. In *Prior v. Gribble* (1) the court declined to enforce *an agreement for compromise on motion in a suit, but that was on the ground that it comprised matters which were not the subject of the suit, and which could not have been made an order of the court. In that case, however, Lord Justice James said that possibly under the new system of judicature the court would have power to deal summarily with these things; and in *Eden v. Naish* (2) Vice-Chancellor Hall decided that under the Judicature Act, 1873, s. 24, sub-sects. 5, 7, the court had jurisdiction upon summons to enforce an agreement made between the parties, and a case of *Hakes v. Hodgkins*, before the Master of the Rolls, was cited as an authority.

Higgins, Q.C., for the defendant: Part of the compromise entered into at the hearing was, that the bill was to be dismissed. There is consequently no suit now pending between the plaintiff and defendant. The plaintiff has got a decree in that suit, and he may enforce it as he may be advised, but the court has no jurisdiction to make such an order as is now asked.

Glasse, in reply.

MALINS, V.C.: This is a case of an extraordinary character, in which the plaintiff instituted a suit against the defendant to obtain a sum of money which he said he had been fraudulently induced to lay out in the purchase of shares in mines which were said to be in a very prosperous condition, when in fact they were not. When the case was before me I expressed a strong opinion against the conduct of the two defendants, which I regarded as fraudulent. Before the case was heard out, however, the defendants submitted to a decree in these terms: that the defendant Alfred Endean was to enter into a bond to pay to the plaintiff the amount of the purchase-money for the shares with interest at £5 per cent. per annum from the day of the purchase, and £100 for costs, and he was to deposit 1,000 paid-up shares in another company as security for the fulfilment of these terms.

*After the decree, which was against the son, a correspondence took place, and upon a representation being made to the plaintiff's solicitor that the defendant, Alfred Endean, was penniless, and was quite unable to pay the claim against him, a compromise was effected, under which it was agreed that the plaintiff should accept £500, which

(1) Law Rep., 10 Ch., 584.

(2) 7 Ch. D., 781; 25 Eng. Rep., 9.

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was to be paid by the defendant by instalments. When the compromise was read to me, I was surprised to find the plaintiff coming to enforce an order that was varied by consent, because the motion now before me is that the plaintiff may be at liberty to proceed against the defendant, Alfred Endean, under the order of April, 1877. But, considering that the parties entered into this compromise after the decree, I do not see how the plaintiff could enforce the order without coming to the court for that purpose. What the plaintiff now says is, that he was induced to enter into this compromise upon the representations made to him by the defendant, and it turns out now that at the time of the compromise the defendant's father, John Endean, was dead.

It seems that the father left a wife and a son, the present defendant, and died intestate. In that case, any real property which he left would go to the son, and two-thirds of any personal property would also go to him. The statement, which is not denied, is, that the defendant's solicitor did know of the father's death at the time of the compromise, but the plaintiff's solicitor did not, and no inquiry, therefore, was made about a will. The death of the father would no doubt have materially altered the position of affairs, and the plaintiff would not, he says, have entered into this compromise if he had known it.

The question is whether, under such circumstances, the compromise ought to stand good.

In the case of *Scully v. Dundonald* (*) I stated my adherence to the rule that a compromise effected in a suit in this court could be enforced by summary proceeding, but I did not think that I had power to enforce the compromise of an action in the Common Pleas. The Court of Appeal, however, made an order to enforce the compromise, the effect of which was, I am glad to say, to carry out the justice of the case.

265] *The original decree in this suit, which was made by the consent of the parties, has been stopped by the defendant taking advantage of the plaintiff's ignorance of the facts, and therefore I will now accede to the motion and give the plaintiff liberty to enforce the decree, notwithstanding the subsequent agreement for compromise.

The defendant appealed. The appeal was heard on the 26th of June.

Higgins, Q.C., and *Whitehorne*, for the appellant: This is substantially a proceeding to set aside a compromise as

(*) 8 Ch. D., 658; 25 Eng. R., 551.

obtained by fraud. The court has no power to do so in this form of proceeding: it is a matter for an independent action. Much of the evidence is only given on information and belief, and it is a very serious matter to decide that parties have been guilty of fraud and misrepresentation on loose evidence of this kind.

Glasse, Q.C., and *Grosvenor Woods*, for the plaintiff, were not called upon.

JESSEL, M.R.: This is an appeal from an order of Vice-Chancellor Malins, which we have heard upon the merits, but there were objections taken as to the form of the order and as to the nature of the application and the evidence, some of which I think ought to have and would have succeeded had they been taken in the court below.

The short statement of the case is this. The plaintiff had obtained a judgment against the defendant, Alfred Endean, ordering him to give a bond for payment of a sum of money on the ground of an alleged misrepresentation with respect to some mining shares. Alfred Endean did not pay, nor did he give the bond to secure the payment which was required by the judgment. Thereupon, the judgment itself being the result of an imparlance, there was a further imparlance, and a compromise was arrived at, the substance of which was that the plaintiff was to take £500, and to take or keep some shares in settlement of his whole cause of action, and the two last instalments of the £500 were to be *guaranteed by Mr. Gregory, the solicitor of the de- [266 fendant, Alfred Endean, and if the instalments were not duly paid the plaintiff's rights were to revive.

The real question in dispute between the parties is whether that compromise ought to be set aside on the ground that it was obtained by misrepresentation or concealment of material facts. The mode adopted for bringing that question to trial was a motion to enforce the judgment. Now it happens accidentally, for I have no doubt it is an accident, that the judgment required a further motion to enforce it, because it fixed no date for the acts to be done. The one act is directed to be done "forthwith," and the other act is simply directed to be done without any reference to time. Therefore, technically, no doubt a motion for fixing a day was required, and until a day was fixed the order could not be enforced. Now, it appears to me that though that technicality would support the motion it would not have justified it, the object of the motion, as I said before, being, not to supply that technical defect, but to decide a substantial question between the parties, which, as it appears to me,

should have formed the subject of a new action. However, that ground was not taken before the Vice-Chancellor, but the matter was fought out on the merits, and there being a technical ground on which the motion could be supported, it appears to me that it is now too late for the appellant to take the objection that the motion ought not to have been heard.

Then we come to the question as to the evidence in support of the motion. Here I must say that in my opinion a charge of misrepresentation or concealment ought not to be supported by affidavits on information and belief. No doubt in the case of interlocutory applications the court as a matter of necessity is compelled to act upon such evidence when not met by denial on the other side. In applications of that kind the court must act upon such evidence, because no other evidence is obtainable at so short a notice, and intolerable mischief would ensue if the court were not to do so. The object of these applications is either to keep matters as they are or to prevent the happening of serious or irremediable mischief, and for those purposes the court has been in the habit of acting upon this imperfect evidence. 267] But the *court has no right to act upon it in finally adjudicating upon the rights of parties. This point was in fact decided long ago in the Court of Chancery, for although motions for decree were held to be motions for various purposes, it was decided that they were not motions for the purpose of evidence, because they were decisions on the ultimate rights of parties. Therefore, I must not be supposed to approve of what was done, but I think a court of appeal cannot refuse to decide on the merits where the parties in the court below argued the case on the merits without objecting to the evidence. They must be taken to have assented to having their rights decided on the motion according to the usual rules governing interlocutory motions. If they wished them to be decided otherwise, they should have objected to the reception of the evidence. I think, therefore, it is impossible for the appellant to succeed upon that ground, not having taken that course in the court below.

I now come to the merits of the question, and I am unable to dissent from the conclusion at which the Vice-Chancellor has arrived. The real question appears to be whether the death of the father was so obviously a material circumstance that the defendant's solicitor ought to have communicated it to the other side. It appears to me that the fact was material, and ought to have been known by Mr. Gregory to

have been material to be communicated, and that it was not communicated, and that the compromise was allowed to be signed when Mr. Gregory knew, or ought to have known, that Mr. Greenip was ignorant of the fact of the death of the father; and it appears to me that the compromise cannot be supported, and that the Vice-Chancellor's conclusion is right in substance, and ought to be affirmed.

BRETT, L.J.: The order appealed against is really founded upon a decision by the Vice-Chancellor that the compromise was obtained improperly, and so improperly, that those who wished to rely upon it could not enforce it. I am of opinion that, striking out everything which is only deposed upon information and belief, and taking only the facts which were admitted on both sides, that decision was right.--

*It seems to me that the ground upon which the [268 plaintiff was asked to enter into a compromise was that the son was absolutely without means, that his father had the means, but was refusing to assist him, and that therefore the only way in which the son could fulfil the compromise was by the assistance of other friends than the father. It seems to me that on the 25th of March, when this compromise was finally procured, that statement was in effect repeated. The grounds upon which the solicitor of the plaintiff was asked to enter into the compromise were substantially the same, and the representation was continued by conduct, although not repeated in terms, that the son was without means because the father was still alive, and was still refusing to assist. It was brought to the mind of the defendant's solicitor that that was the ground upon which the plaintiff's solicitor would enter into negotiations, and probably come to a compromise. He knowing that, and knowing, therefore, the materiality of the fact of the father being dead, intentionally concealed that fact, knowing, or feeling perfectly convinced, that if he said that the father was then dead the other solicitor would immediately stop the negotiations. It seems to me that his concealment of that fact under those circumstances amounted virtually to an absolute misrepresentation of fact by which the contract was obtained. If that be so the compromise was a void contract, and the decision of the Vice-Chancellor was right in saying that it was so.

COTTON, L.J.: I agree in the opinion expressed by the other members of the court, and I should add nothing but for the way under which the case comes before us. It comes before us on motion, but though it comes before us in that form, we have to decide the ultimate rights of the parties, and in my opinion, as regards evidence, it ought to be dealt

with just in the same way as if a bill had been filed. I am not now adverting to the question as to whether or no the evidence ought to have been given *vivâ voce* or by affidavit, but to the question whether the rule that on interlocutory applications the court may act upon evidence given on the witness's information and belief applies to the present case. But for the purpose of this rule those applications only are 269] *considered interlocutory which do not decide the rights of parties, but are made for the purpose of keeping things in *statu quo* till the rights can be decided, or for the purpose of obtaining some direction of the court as to how the cause is to be conducted, as to what is to be done in the progress of the cause for the purpose of enabling the court ultimately to decide upon the rights of the parties. Now many of the cases which are brought before the court on motions and on petitions, and which are therefore interlocutory in form, are not interlocutory within the meaning of that rule as regards evidence. They are to decide the rights of the parties, and whatever the form may be in which such questions are brought before the court, in my opinion the evidence must be regulated by the ordinary rules, and must be such as would be admissible at the hearing of the cause. In my opinion, therefore, on such applications, if an affidavit on information and belief is made, the other side is not called upon to answer it under the peril of its being said to him, "You have in fact admitted this by not denying it, and therefore the court may act upon the admission." But I must add this: where in the court below the evidence not being strictly admissible, not being that upon which the court can properly act, if the person against whom it is read does not object, but treats it as admissible, then before the Court of Appeal, in my judgment, he is not at liberty to complain of the order on the ground that the evidence was not admissible. But in such a case the court does not act on the statement as being evidence properly admissible, but because the party has by the course which he adopted waived proof of the facts stated on information and belief. I have said this because I think that the matter is one of very considerable importance, and that the habit of introducing into applications to decide the rights of parties evidence on information and belief has done great injury in many ways in the Chancery Division. It lengthens the evidence, adds greatly to the expense, and has often caused a great deal of difficulty, both in the court below and in the Court of Appeal, in ascertaining the real facts. In the present case, if one had to rely, for the purpose of affirming the

decision of the Vice-Chancellor, upon anything which on these affidavits was merely stated on information and belief, I should *have considerable difficulty in arriving at [270 the conclusion that the order could be supported, unless I was quite satisfied that in the court below it had been argued on the admission, or the practical admission, that the facts were as stated on information and belief. But an admission has been made that the father of the appellant was, or was reputed to be, a man of property. There had been communications during the lifetime of the father, and representations had been made that the defendant could not pay anything but by his friends' help. Then at the meeting on the 25th of March Mr. Gregory, the defendant's solicitor, did know, and on the evidence I think we must take it that Mr. Greenip, the plaintiff's solicitor, did not know, that the father was dead. As the father was a man of reputed means, the question of whether or no he was living at the time when this interview took place was a material circumstance, which would materially influence Mr. Greenip, for whether the father died testate or intestate, it would be at least a matter to be inquired into whether Endean had not acquired property from him. I therefore arrive at the conclusion that there is, according to Mr. Gregory's own statement, a concealment amounting to misrepresentation of facts as regards the father. I do not at all say that Mr. Gregory made an intentional and fraudulent misrepresentation, but still, in my opinion, he made what Mr. Greenip would naturally take as a representation that the father was still living. With whatever intention that representation was made, it was a misrepresentation of a fact material for Mr. Greenip to know, and I think that the plaintiff is entitled to be relieved from the effect of a compromise obtained by such a misrepresentation.

Solicitors for plaintiff: *Snell & Greenip.*

Solicitor for defendant: *C. Gregory.*

The decision of a *motion* is not *res adjudicata* in the proper sense of the term: *Banks v. American Tract Society*, 4 Sandf. Chy., 438; *Pendleton v. Weed*, 17 N. Y., 77-8; *Dolfus v. Froesch*, 5 Hill, 498; *Snyder v. White*, 6 How., 321; *Smith v. Spalding*, 30 How., 339; *Riggs v. Pursell*, 74 N. Y., 370; *Easton v. Pickersgill*, 75 N. Y., 599, 8 N. Y. Weekly Dig., 37.

The court has the *power*, in its discretion, to rehear a motion on the same papers: *White v. Munroe*, 33 Barb., 650; *Smith v. Spalding*, 30 How., 339;

Tone v. Brace, Clarke's Chy., 503; *Riggs v. Pursell*, 74 N. Y., 370.

But, as matter of practice, the first decision is considered conclusive upon the same state of facts: *Banks v. American*, etc., 4 Sandf. Chy., 438; *Dolfus v. Froesch*, 5 Hill, 498; *Snyder v. White*, 6 How., 321; *Schlemmer v. Myersteen*, 19 How., 412; *Ammidon v. Wolcott*, 15 Abb. Pr., 315; *Dwight v. St. Johns*, 25 N. Y., 203; *Smith v. Spalding*, 30 How., 339; *Livingston's Petition*, 2 Abb. (N.S.), 2; *Fenton v. Lumberman's*, etc., Clarke's Chy., 360;

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Tone v. Brace, Id., 508; Wheeler v. Falconer, 7 Rob., 45; Fowler v. Huber, 7 Rob., 52; White v. Munroe, 33 Barb., 650; Dunn v. Meserole, 5 Daly, 584; First, etc., v. Hamilton, 50 How. Pr., 116.

Where the court inadvertently fixed the costs of an appeal at much less than the party was entitled to, held it was irregular for the clerk to tax them at the full amount to which the party was entitled. Application should have been made to the court to correct the order: Williams v. Murray, 32 How. Pr., 187, 2 Abb. Pr. (N.S.), 292.

The decision of a motion will be regarded as *res adjudicata* as to a motion, even in another action, for the same relief: People v. Kelly, 1 Abb. Pr. (N.S.), 432.

A motion once denied cannot be renewed, as a matter of right, except upon a different state of facts arising subsequent to the decision of the former motion: Bank v. Moore, 5 Hun, 624.

A motion once denied cannot be reviewed, even on fresh papers presenting further evidence, without leave: Schultze v. Rodewald, 1 Abb. N. C., 365.

And on a *new state of facts*, except upon leave first had to apply anew: Banks v. American, etc., 4 Sandf. Chy., 488; Lovell v. Martin, 21 How., 238.

See Tone v. Brace, Clarke's Chy., 508.

The authority of the decision is equally binding whether an order is entered or not: Wheeler v. Falconer, 7 Rob., 45; Eighmy v. People, 79 N. Y., 546, 552, 557.

If the party desire to renew a motion, unless the order state it to be without prejudice, he should move for leave to do so: Dolfus v. Frosch, 5 Hill, 493; Smith v. Spalding, 30 How., 339.

Although a motion cannot be renewed without leave, it is common to give notice of an application for such leave, and in the same notice to give notice of renewing such motion conditionally, in case such leave be granted: Fowler v. Huber, 7 Rob., 52; Crocker v. Crocker, 1 Buffalo Superior Ct. R., 275.

A motion should not be denied merely on the ground that a motion of the same nature has already been made

and denied, if new facts are proven on the second motion, such as would be ground for giving leave to renew: Butts v. Burwell, 6 Abb. (N.S.), 302.

Leave to renew a motion will be denied if founded on the same facts: Lovell v. Martin, 12 Abb., 178.

Or, where all the facts were known to the party when the original motion was made: Pattison v. Bacon, 21 How., 478.

Upon a motion for leave to renew a motion, the merits of the main application are not to be investigated or determined: Crocker v. Crocker, 1 Buffalo Superior Ct. R., 274.

A party, by appealing from an order denying a motion with leave to renew the same, is precluded from taking advantage of the leave to renew granted thereby, and such appeal will be dismissed, if, while the same is pending, the motion be renewed in the court below: Harrison v. Nehr, 9 Hun, 127; Whitney v. Mayor, 37 N. Y., 600; Fisher v. Gould, 9 Weekly Dig., 44.

A motion may be renewed upon a different state of facts, or by supplying defects in proof: Riggs v. Pursell, 74 N. Y., 370; Easton v. Pickersgill, 75 N. Y., 599, 8 N. Y. Week. Dig., 37.

Where a special motion is made and denied without any leave given to renew it, if either party desires to be relieved of the order, an application should be made to the court for leave to have a rehearing. Upon such an application, addressed to the discretion of the court, fresh facts or some good excuse should be furnished.

If a new state of facts arises after the hearing and denial of a motion, a new motion may be made based upon such new facts, and granted, even when leave has not been obtained to renew.

It is within the discretion of the court to allow a motion to be renewed upon the same state of facts, upon an application addressed to the discretion of the court for that purpose: Wentworth v. Wentworth, 51 How. Pr., 289.

But where a motion for an extra allowance was denied after the first trial, it is no bar to a like application after a second trial, if the circumstances on that are materially different: Fox v. Fox, 24 How., 385.

The rule that a motion denied by one judge cannot be renewed before another on the same facts, without leave,

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does not apply to the case of an application to the discretion of the court to allow bail to surrender as matter of favor, upon excuse for delay, after an application for exoneration as matter of right has been denied on the ground that the strict time had passed: *Hall v. Emmons*, 9 Abb. Pr. (N.S.), 370; S.C., 2 Sweeny, 396, reversing 8 Abb. (N.S.), 451.

But a decision upon a motion is not usually *res adjudicata* as to a subsequent suit, for on the motion there is no opportunity to call witnesses or cross-examine those who make affidavits: *Van Rensselaer v. Sheriff*, 1 Cow., 502; *Pendleton v. Weed*, 17 N. Y., 77-8; *Snyder v. White*, 6 How. Pr., 321; *Smith v. Spalding*, 30 How. Pr., 339; *Hoffman v. Hoffman*, 46 N. Y., 30-2; *Simpson v. Hart*, 14 Johns., 63; *Belmont v. Erie*, etc., 2 Barb., 637, 642; *Howell v. Mills*, 53 N. Y., 823; *Riggs v. Pursell*, 74 N. Y., 370.

A refusal to grant relief upon a sum-

mary application is not ordinarily a final adjudication of the merits of the controversy. It will bar another summary application unless leave is given to renew, but will not affect any other remedy. A provision, therefore, in an order denying relief upon such an application, which assumes to limit the rights of the parties to bring an action for relief either by prescribing terms or limiting the time for the commencement of such an action, is erroneous: *Howell v. Mills*, 53 N. Y., 323.

When, however, the court has power to refer questions of fact to referee, before whom witnesses may be called and fully examined, and such a reference is made, the facts fully investigated, and a report made by the referee, a decision upon such a motion is *res adjudicata*: *Dwight v. St. John*, 25 N. Y., 203.

See *Concklin v. Taylor*, 68 N. Y., 221; *Jordan v. Volkenning*, 72 N. Y., 300, 307.

[9 Chancery Division, 275.]

V.C.H., June 7: C.A., June 26; July 1, 1878.

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[1878 A. 76.]

Judgment Creditor—Receiver—27 & 28 Vict. c. 112, s. 1—*Judicature Act*, 1873, s. 25, subs. 8—*Rules of Court*, Order XLII, rr. 1, 23.

A creditor, who had recovered judgment in an action in the Chancery Division for payment of a sum of money, sued out an *elegit* against his debtor, whose only interest in land was an equity of redemption in fee. The creditor then commenced an action in the Chancery Division, claiming to have it declared that he was entitled to a charge on the land, and to have such charge enforced by sale, foreclosure, delivery in execution, or otherwise as the court might direct, and asking for a receiver. The plaintiff then moved for a receiver in the new action.

Held, by Hall, V.C., and by the Court of Appeal, that the statute 27 & 28 Vict. c. 112, s. 1, did not take away the old right which a judgment creditor had before the statute 1 & 2 Vict. c. 110, to take proceedings in equity to obtain the benefit of a judgment which there were legal impediments to his enforcing at law, and that the plaintiff was not obliged to wait till the trial, but might obtain a receiver on interlocutory application in the new action.

Whether the appointment of a receiver could have been obtained in the old action, *quære*.

Discussion of the powers given to the court of appointing receivers by *Judicature Act*, 1873, s. 25, subs. 8.

ON the 8th of January, 1878, the plaintiffs recovered against the defendant judgment in the Chancery Division in an action of the same name [1877 A. 118] for £87,591 and

costs. The defendant was entitled to real and personal estate. The plaintiffs recovered a small sum under a *fl. fa.*, a return of no further goods being made, and took out writs of *elegit* against the defendant's real estate. But it turned out that it was subject to legal mortgages and could not be given in execution by the sheriff. No return was made to the writs of *elegit*. The plaintiffs thereupon commenced this action, claiming to have it declared that under and by virtue of their judgment they were entitled to a charge upon all and every the lands, tenements, and hereditaments whereof the defendant was seised, possessed, or entitled for any estate or interest in equity or at law, whether in possession, reversion, remainder, or expectancy, and in particular upon his estate and interest in certain hereditaments mentioned in the writ; to *have such charge enforced by sale, foreclosure, delivery in execution, or otherwise as the court might direct; and for a receiver and injunction; and the plaintiffs claimed discovery from the defendant as to the several matters aforesaid, and generally in aid of the writs of *elegit* issued by them upon their said judgment.

The plaintiffs then moved before Vice-Chancellor Hall that a receiver might be appointed of the rents, profits, surplus or other proceeds of sale, and all other moneys, if any, whereunto the defendant then was or might be entitled, or which might be, or but for the order to be made on the motion, might be payable to the defendant or any person or persons on his behalf arising from or in anywise in respect of certain specified estates, and any other lands, tenements or hereditaments in the city of London and the counties of Middlesex and Sussex, or any estate or interest of the defendant, whether at law or in equity, in the hereditaments thereinbefore particularly mentioned, and any such other lands, tenements, or hereditaments as aforesaid, with all necessary and proper directions in that behalf; with the usual directions for the delivery of deeds to the receiver, and an injunction to restrain the defendant from receiving such rents, profits and moneys.

The motion was heard before Vice-Chancellor Hall on the 7th of June, 1878, and was supported by evidence that the defendant was selling various parts of his real estates.

Dickinson, Q.C., and Ingle Joyce, for the motion.

Hastings, Q.C., and Romer, contra.

The arguments before the Vice-Chancellor were the same as the arguments before the Court of Appeal, which are given below; and in addition to the authorities cited to the

Court of Appeal the cases of *Wells v. Kilpin* ⁽¹⁾ and *Beckett v. Buckley* ⁽²⁾ were referred to.

HALL, V.C.: The question in this case is one which, I think, has never been decided, excepting so far as it was decided in *Tillett v. Pearson* ⁽³⁾. *The decision in [277 that case appears to be applicable to the present case, but not to have been a decision upon argument.

Considering the case independently of that decision, I will endeavor to state what I consider to be the correct conclusion. I should have wished to be able to give the case more consideration, but from its nature I think it incumbent upon me to dispose of the matter now.

The argument is presented thus on behalf of the applicant. He says: "Apart from the two statutes, 1 & 2 Vict. c. 110, and 27 & 28 Vict. c. 112, I should have had, under the circumstances of this case, a right to come to the court to have relief by the appointment of a receiver over these particular properties which belonged to the debtor, subject to the rights of any prior incumbrance, so as to protect the property in order that it might be made available for my judgment." The applicant then contends that the right has not been interfered with or taken away by either of those statutes.

As regards the first statute, there is nothing in it which it can be contended takes away the right. That statute gives enlarged rights to the judgment creditor, making the whole of the interest of the debtor, and not merely a moiety of it (which was the common law right), liable under an elegit, and it gives him a general charge over other properties than those which were available for the benefit of judgment creditors before the act.

The act 27 & 28 Vict. c. 112, is the one which it is most important to consider in this case, and its first section is relied on in answer to this application. That section is, "No judgment, statute, or recognizance to be entered up after the passing of this act shall affect any land (of whatever tenure) until such land shall have been actually delivered in execution by virtue of a writ of elegit or other lawful authority, in pursuance of such judgment, statute, or recognizance." It is said that the plaintiff in this action is by force of that section not entitled to come to the court for a receiver until after such time as he shall by means of a decree or order in this action have been declared to have a lien on the land under his judgment. It appears to me

⁽¹⁾ Law Rep., 18 Eq., 298.

⁽²⁾ Law Rep., 17 Eq., 435.

⁽³⁾ 43 L. J. (Ch.), 93.

that this is not a sound view. In *Hatton v. Haywood* (¹), 278] the question was whether *a judgment, in respect of which there was no delivery in execution "by virtue of a writ of elegit or other lawful authority," could prevail over a bankruptcy. Before there had been a delivery in execution, the whole of the bankrupt's property passed to the trustee under the bankruptcy, subject only to such judgments as at the time of the bankruptcy were effectual as against bankruptcy. Judgments against real and personal estate were intended by the act to be placed on the same footing, and if the judgment in any given case would not have been effectual as against personalty, it was not intended that it should be effectual against realty. Therefore, when you come to apply sect. 1 to the case, as the law with respect to real estate is to be assimilated to that relating to personal estate, the result is, that there being no execution there is no lien, and the property must pass to the trustee free from the judgment. The main purpose and object of the act was to facilitate the transfer of land by rendering it unnecessary to make searches for judgments on the purchase of land, and the law was altered step by step with a view to giving purchasers a good title as against judgments. But I see no reason, founded on the policy of the act, why the law should be changed in a case like that now before the court. If under the old law the creditor would have been entitled to come to the court and say, "I have a judgment which I cannot enforce because there is a legal impediment, let me enforce it through the equitable jurisdiction of the court," I see no reason why the court should refuse to give the creditor all the advantages which he would have had, independently of the acts, subject of course to any rights which third parties might have acquired by alienation or bankruptcy, or otherwise.

When we read the judgments in that case, I think the learned judges held that if you get a receiver the provisions of the act are complied with, for that you get a delivery of the land in execution by virtue of "other lawful authority." This is exactly what the applicant has come for. He has come for a receiver, so that he may be in possession by lawful authority, and Lord Selborne in his judgment refers to *Thornton v. Finch* (²), as showing that, although the land 279] was not specifically bound until taken *in execution, yet the inchoate right under 1 & 2 Vict. c. 110 might be made the foundation of a suit in equity to remove the legal difficulty in the way of making a perfect charge. Therefore it

(¹) Law Rep., 9 Ch., 229, *ante*.

(²) 4 Giff., 515.

appears to me that there is nothing whatever in that judgment hostile to the application which is made in the present case.

Then, if the difficulty upon the statute does not exist, as I think it does not, is the applicant entitled, under the practice of the court, to make this motion under existing circumstances? Considering the nature of the property which the motion seeks to make applicable—a property which, if it remains in the hands of the debtor may, by means of a sale or disposition, be rendered unavailable for the purpose of the execution—a property which, in the view of this court must be considered liable to equitable execution, this appears to me a proper case for the exercise of the jurisdiction. I do not consider that any of the cases referred to are hostile to this conclusion. The decision of Vice-Chancellor Wood in *In re Cowbridge Railway Company* (*) certainly is not, for his view was that it was not intended by the second act to take away the rights which existed under 1 & 2 Vict. c. 110. The observations of Lord Justice Giffard in *Guest v. Cowbridge Railway Company* (*) do not appear to me to be adverse to my view, but in fact to support it.

It appears to me, therefore, that an order ought to be made for a receiver according to the terms of the notice of motion.

The defendant appealed. The appeal came on to be heard on the 26th of June.

Hastings, Q.C., and Romer, for the appellant: Our case is, that until the land has been delivered in execution, or an order made declaring the judgment creditor to have a charge on it, he, by virtue of 27 & 28 Vict. c. 112, s. 1, has no interest in the land and cannot apply for a receiver. The right to a receiver depends on the plaintiffs having a charge, and the statute says that till certain things have been done the judgment shall not affect the land. *Halton v. Haywood* (*) decides that a judgment *creditor to whom [280 the land has not been delivered in execution has no charge as against a trustee in bankruptcy. We do not dispute that at the hearing the plaintiffs might get a declaration that they were entitled to a charge, and then obtain a receiver. *Wells v. Kilpin* (*) bears out the view that there is no present charge.

[JESSEL, M.R.: In that case equitable execution was granted by the appointment of a receiver.]

(*) Law Rep., 5 Eq., 413.

(*) Law Rep., 9 Ch., 229, *ante*.

(*) Law Rep., 6 Eq., 619.

(*) Law Rep., 18 Eq., 298.

Yes, but at the hearing.

[JESSEL, M.R.: The question is, whether it may not be obtained before the hearing.]

Then we say that the receiver cannot be obtained on interlocutory application in this action, because that is giving on motion the whole relief to be obtained in the action.

[JESSEL, M.R.: In a proper case why may it not be given before the hearing?]

It would be inconsistent with 1 & 2 Vict. c. 110, s. 13, which provides that relief is not to be obtained within the year.

[JESSEL, M.R.: Does that apply to any relief except the enforcing the equitable charge created by that statute?]

Here is a judgment which at present does not affect the land: how can bringing an action give a right to appoint a receiver on motion? the commencing the action cannot make the judgment affect the land. In *Tillett v. Pearson* (*) it was held that a judgment creditor who had sued out an *elegit* and got a return from the sheriff might file a bill for a receiver. The Vice-Chancellor considered that the only case bearing on the present, and it is distinguishable, for here there has not been a return. The property, moreover, was a wasting property, and the case was not argued. The return to the writ brought the case within the words of the 1st section.

[JESSEL, M.R.: The ground on which I went in that case was that it was giving equitable execution.]

The Judicature Act, 1873, s. 25, subs. 8, does not warrant the giving the whole relief sought in the action on an interlocutory application.

281] * [JESSEL, M.R.: I do not agree with that view; but it appears to me a question whether it was necessary that there should be a fresh action, and whether the receiver might not have been appointed in the original action.

Dickinson, Q.C.: The Vice-Chancellor, on his attention being directed to *In re Cowbridge Railway Company* (*) and *Guest v. Cowbridge Railway Company* (*), had intimated that a fresh action would be necessary.]

Assuming that the relief sought at the hearing can be granted now, the court will not enforce the judgment within the year, *Smith v. Hurst* (*); though it can interfere to protect the property: *Partridge v. Foster* (*); *Watts v. Jefferyes* (*). We say that even if the plaintiff is entitled

(1) 48 L. J. (Ch.), 98.

(2) Law Rep., 5 Eq., 418.

(3) Law Rep., 6 Eq., 619.

(4) 1 Coll., 705.

(5) 34 Beav., 1.

(6) 3 Mac. & G., 372.

the new action is an improper one, for that the relief could have been obtained in the old one.

[JESSEL, M.R.: Can that be anything more than a question of costs? *Clutton v. Lee* (').]

If a new action is wanted, the relief should be obtained at the trial. A motion ought to be in the original action, not in the new one.

Dickinson, Q.C., and *Ingle Joyce*, contra: Our case does not depend on the statutory charge, but on the general right of a judgment creditor: *Mitford on Pleading* ('); *Curling v. Marquis Townshend* ('); *Lord Dillon v. Plaskett* ('); *Neate v. Duke of Marlborough* ('). In *Smith v. Hurst*, an elegit not having been issued, the court could not interfere under the old law, so the case turned on the 1 & 2 Vict. c. 11.0 The case is a clear one for equitable relief; there are impediments to the judgment being enforced at law. Then, can it be done on interlocutory application? *Smith v. Hurst* is an authority that it can, for a receiver was there granted on motion as to the chattels. *Hatton v. Haywood* (') does not affect us. The plaintiff there could only *succeed [282 by showing that he had an interest in the land at the time of the bankruptcy, at which time possession had not been given. The statute 27 & 28 Vict. c. 112 has not taken away the old right to come into equity to have possession delivered.

Hastings, in reply.

JESSEL, M.R.: This is an appeal from the decision of Vice-Chancellor Hall, and it raises an important question, which has been argued at very great length, and which I lament to have been capable of argument. There is an unsatisfied and undisputed judgment against the defendant for many thousand pounds. The defendant is in possession of freehold land in fee simple of which he is receiving the rents. That land happens to be subject to a mortgage, and, the legal estate being outstanding in the mortgagee, the judgment creditor cannot obtain possession of it under the ordinary writ of elegit. It is gravely urged that, notwithstanding the act of Parliament which applies equitable rules to all matters, the owner of the land can by reason of the outstanding mortgage, remain in possession and receive the rents in defiance of the judgment creditor until the trial of the action, if indeed the argument does not go the length of saying that the judgment creditor has no remedy. I lament,

(') 7 Ch. D., 541.

(') Page 126.

(') 19 Ves., 628, 632.

(') 2 Bli. (N.S.), 239.

(') 3 My. & Cr., 407.

(') Law Rep., 9 Ch., 229, *ante*.

I say, that it was possible to argue such a case, and it is only possible, because the words of the statute 27 & 28 Vict. c. 112, are such as do not fit in with the preamble of the act or with the ordinary knowledge of judgment law possessed by those acquainted with the subject. The act was no doubt passed for a very useful purpose, but I think I can safely say it never could have been in the contemplation of the framers that it should be sought to be made use of for such a purpose as this. However, we must deal with the act as we find it. It says (sect. 1): "No judgment, statute, or recognizance to be entered up after the passing of this act, shall affect any land (of whatever tenure) until such land shall have been actually delivered in execution by virtue of a writ of elegit or other lawful authority, in pursuance of such judgment, statute, or recognizance."

The first question that arose after the passing of the act 283] was "what was the meaning of "actually delivered in execution." Everybody knew what "delivered in execution" meant, but "actually delivered in execution" was not so easy to understand. It was decided that it meant the same thing as "delivered in execution," and therefore that difficulty vanished.

The next question was what was the meaning of "other lawful authority." Those words became the subject of judicial decision, and, as I understand the result of that decision, it was this: that the words referred to the order of a court having authority to give that which amounted to delivery in execution, although not technically a delivery in execution, in other words, to what was commonly called equitable execution, which was putting the land in the possession of a receiver. That was decided by the full Court of Appeal in *Hatton v. Haywood* (').

Then the next question is, how this equitable execution is to be obtained? I will take the two periods, those before and after the passing of the Judicature Act. Before the passing of the Judicature Act the mode of obtaining equitable execution was by issuing a writ of elegit, and, without obtaining a return, to file a bill in equity alleging that the plaintiff had issued his writ of elegit, and that owing to legal impediments it could not be enforced at law, and asking for payment of the judgment debt by means of a receiver. According to the practice the application for the receiver was made by interlocutory application before the hearing, and in a proper case it was granted. Now, I am not aware that it was ever decided that it should be refused because

(') Law Rep., 9 Ch., 229, *ante*.

the defendant was owner in fee simple. It ought to be granted in every proper case.

In dealing with such an application the first point to be considered was whether there was an undisputed judgment. In this case it is quite clear that there is. The next point was: Has the defendant got the land? because he might say, "Do not appoint a receiver of somebody else's land; I am not in possession; I have nothing to do with it." Here there is no dispute about that. When those two points were answered the third point was: "Is the interest of the debtor in the land such that it cannot be reached at law?" If that was answered in the affirmative, as it must be in the case of an equity of redemption (for the Statute of *West- [284]minster was extended by the Statute of Frauds only to the case of pure equities, that is, where there was a bare trust and not an estate like an equity of redemption),—if that was answered in the affirmative it seems to me that the order should be of course. It does not appear to have been necessary to consider any such question as whether the debtor's interest was a life estate or an estate for years or a wasting property. The creditor wanted his money, and it would have made a great difference to him whether he got it then or five or ten years later, after the case had come to a hearing. In former days the market value of a fee simple in possession and of a fee simple in reversion after the trial of a chancery suit would have been very different. Besides that, it must be remembered that now the liability to become bankrupt is universal. In former days most landed proprietors were not subject to the bankruptcy laws, but that is not so now; and it was decided in *Halton v. Haywood* (1), that the title of the trustee in bankruptcy overrides that of the judgment creditor who has not got his execution. It appears to me, therefore, there is no ground for saying that where all the circumstances I have mentioned concurred, a court of equity would not have granted a receiver before the Judicature Act upon an interlocutory application.

I may mention that every case on the subject with which I am acquainted was a case in which the application was made upon interlocutory motion before the hearing. It was so in the well-known decision of *Lord Dillon v. Plaskett* (2); and Lord Eldon, in giving judgment, does not refer to the fact which was mentioned, not in the bill, but only incidentally in the course of the argument, that Lord Dillon had only a life interest.

The origin of the right which is established by all the au-

(1) Law Rep., 9 Ch., 229, *ante*.

(2) 2 Bli. (N.S.), 239.

1878

Anglo-Italian Bank v. Davies.

C.A.

thorities is shown clearly by *Neate v. Duke of Marlborough* ('). The judgment creditor had no interest in the estate itself, he only had the potentiality of acquiring one. The *elegit* was, as its name imports, only an option to take the lands. The judgment creditor might issue a *fiери facias* by which he could get the goods, or an *elegit*, by which he could get both the land and the goods—originally only half the land, but afterwards, by the statute 1 & 2 Vict. c. 110, 285] *the entirety. It was held in equity—why I do not understand—that the only way of intimating his desire to exercise his option was by issuing the writ of *elegit*. It was argued very strenuously in *Neate v. Duke of Marlborough* (') that a man might say, I exercise my option by telling you I want the land, and I cannot get it at law; why go through the form of issuing an *elegit* which can result in nothing? However, Lord Cottenham, in *Neate v. Duke of Marlborough*, felt bound by the prior authorities, and decided that that useless and absurd form by which the creditor could not get the estate, must be followed, and that the bill failed for not having alleged it. Still the substance of the case was that the judgment creditor had exercised his option to take the defendant's land, and that he could not get it because the defendant's interest was of an equitable nature, which could not be reached except by the assistance of the Court of Equity, and when he showed that he had properly exercised his option, and was in the position of a man who would have got the land at law if the estate had been legal, he was entitled to the assistance of the Court of Equity by interlocutory application if the estate was equitable.

Now, if that were so, undoubtedly this action and order would have been right before the passing of the Judicature Act, unless we are prepared to hold that this is not a delivery in execution. As I have said before, it is always called equitable execution; it was so called so long ago as the time of Lord Thurlow, by Lord Thurlow himself, and I am at a loss to know what is meant by "other lawful authority," unless it be the order of a court of equity which gives equitable execution. I think, therefore, that the order under appeal is a delivery in equitable execution; and even supposing it were not, I still think the order could, prior to the Judicature Act, and after the passing of the act of the 27 & 28 Vict. c. 112, have been maintained. It is quite true the act says the land shall not be affected until it is actually delivered in execution, but the province of the court on interlocutory application was to see that the property did not

(') 3 My. & Cr., 407.

disappear between the time of making the application and the time of the trial. If the plaintiff had a right to have equitable execution, his right existed at *the time of [286 filing the bill. That right was established, no doubt, at the trial or hearing of the cause, but what was established was his original right, and it is the province of a court of equity to keep the property ready for him when the time of establishing his right arrives. It might happen, especially in property of a wasting nature, that nothing might be left at the time of the trial, if the debtor was allowed to continue in possession, and it is the duty of the court to protect the property in the meantime, or, in other words, there is no equity in the defendant to avail himself of the delay, which is a necessary incident of all judicial systems, and I think that the order might have been upheld on that ground, though I prefer the former one.

Now, what has the Judicature Act done? In the first place I think that the act of 1873, sect. 25, sub-sect. 8, has enlarged very much the powers which courts of equity formerly possessed of granting injunctions or receivers. The words are: "A mandamus or an injunction may be granted or a receiver appointed by an interlocutory order of the court in all cases in which it shall appear to the court to be just or convenient that such order should be made, and any such order may be made either unconditionally or upon such terms and conditions as the court shall think just." Then it goes on: "If an injunction is asked either before or at or after the hearing of any cause or matter to prevent any threatened or apprehended waste or trespass," it may be granted whether or not certain things have occurred which prior to the passing of the act would in one alternative have prevented the court from granting an injunction or receiver.

The first point to be considered on that sub-section is, whether it applies to the case of granting an injunction or receiver after the judgment as well as before. I have no doubt that it applies to both. One reason for saying so is, that the words of the section are general. Considering that injunctions and receivers are asked for after judgment as well as before, and were so asked for at the time of the passing of the act, I see no reason for cutting down the general words of this section to make it apply merely to applications before the trial of the action. In the next place we have the words (no doubt limited to waste and trespass), "If an injunction is asked either before or at or after the hearing."

*There a case after hearing is evidently dealt with. [287 Another reason is, that the act transfers the existing jurisdic-

tions, it does not alter them until we come to sect. 24. When we come to look at what the jurisdiction of the common law courts was under the Common Law Procedure Act of 1854, we shall see at once that an injunction could be granted either before or after judgment. The 79th section of that act gives the party injured a right to claim a writ of injunction against the repetition or continuance of such wrongful act, and then the 82d section says this: "It shall be lawful for the plaintiff at any time after the commencement of the action, and whether before or after judgment, to apply *ex parte* to the court or a judge for a writ of injunction to restrain the defendant in such action from the repetition or continuance of the wrongful act or breach of contract complained of, or the committal of any breach of contract or injury of a like kind, arising out of the same contract, or relating to the same property or right; and such writ may be granted or denied by the court or judge upon such terms as to the duration of the writ, keeping an account, giving security, or otherwise, as to such court or judge shall seem reasonable and just, and in case of disobedience such writ may be enforced by attachment by the court, or, when such courts shall not be sitting, by a judge." Now it is impossible to suppose that if you might apply *ex parte* after judgment you might not apply upon notice. It is a case of *omne majus in se continet minus*. When an injunction might be applied for either before or after judgment, it appears to me impossible to limit the effect of the 8th sub-section to a case of applying before judgment. It seems to me, therefore, that there is a larger discretion given by the 8th sub-section to the judges as to when they shall grant an application than they had before. Of course, like every new power, it must be exercised for judicial reasons; but the existence of such power gets rid, as it appears to me, of any decisions, if such decisions there be, limiting the exercise of the discretion as regards the exercising it on an interlocutory application as distinguished from a trial at law.

If that is so, what is the meaning of Order XLII, rule 1? Three of the courts, the jurisdiction of which was transferred, were the courts of common law at Westminster. Their orders and judgments might have been enforced by the 288] Equity Court, and it *does not appear to me to be impossible or difficult to read the words of that rule as including such enforcement by an equity court. It is not absolutely necessary to decide that point, because the 23d rule says, "Nothing in any of the rules of this order shall take away or curtail any right heretofore existing to enforce

or give effect to any judgment or order in any manner or against any person or property whatsoever." Therefore, if the right is not expressly conferred by the 1st rule, it is certainly, as it appears to me, preserved by the 23d rule. In either way, therefore, the right remains.

There is only one further point to be considered. If the right remains, how is it to be exercised? Can it be exercised by motion in the action itself, or is it necessary to institute a new action? If I were driven to express an opinion upon that point I should probably prefer the shorter and cheaper process. But I do not intend finally to decide it, because it is not necessary to do so. Even assuming it were open to the plaintiffs in the action to proceed by motion, still the right to proceed by action is not taken away, the 23d rule is express, and therefore they may proceed by action. If it were clear beyond all question that they ought to proceed in the old action, that might affect the costs of the new action. That point has not been sufficiently discussed for me now to deliver a final opinion upon it, and therefore I prefer saying that the new action is certainly warranted and ought to be entertained.

Under these circumstances it appears to me that the order made by the Vice-Chancellor is right, and that the appeal must be dismissed.

BRETT, L.J.: This order is made in an action brought in the Chancery Division, and which before the Judicature Act could only have been brought in the Court of Chancery. The first question, therefore, seems to me to be whether before the Judicature Act this order could have been made at the present stage of such a suit, and I am satisfied that it could. It seems to me that the only conditions necessary to give the court jurisdiction were that there should have been a judgment obtained in a court of common law, that [289 a writ of *elegit* should have issued, and that the interest in the real property of the judgment debtor should be an equitable interest such as could not be taken in execution at law. The moment those conditions were fulfilled I think it is made out the Court of Equity had jurisdiction to make such an order. It seems to me that Mr. Dickinson has made out that such an order might have been made and would have been made before the Judicature Act, upon those conditions, and those only, being fulfilled, and therefore that this order could have been made before the Judicature Act. I do not think the act of 27 & 28 Vict. c. 112, has prevented the Court of Equity exercising that jurisdiction. It is true that the statute says that no judgment shall affect the land

until it is actually delivered in execution. It seems to me that the argument founded on this enactment is based upon phrases which have been used with regard to a judgment or the writ of *elegit* having charged lands or having given a general lien upon lands. I cannot help thinking that the best phrase was that judgments gave "a sort of general lien." It is difficult to say what the meaning of the term "general lien" here is in this case. It is a term used at law, but the difference there is between a particular lien and a general lien. A particular lien is given upon goods in respect of work done upon those goods, a general lien is given in respect of work which may have been done upon other goods; but if we speak of a judgment giving a general lien upon land, this can only mean that it has something like the same effect upon land that a claim of general lien has upon goods. We may disregard that phrase, for it was not necessary to say that the judgment affected the land, or charged the land, or that the writ of *elegit* charged the land before the writ of *elegit* was executed. This jurisdiction was exercised, although before the passing of 27 & 28 Vict. c. 112, it might be said that neither the judgment nor writ charged the land or affected the land at all, and that statute which was passed for another purpose does not affect the jurisdiction.

On this view it seems to me unnecessary to determine in the present case what is the effect of appointing a receiver at this stage of the cause as regards the provisions of the 27 & 28 Vict. c. 112. It is not necessary to determine [290] whether appointing a *receiver at this stage is within the meaning of that act an actual delivery in execution or not, because, as it seems to me, this jurisdiction can be exercised although neither the judgment nor the writ of *elegit* can be said to affect the lands at all. I decline, therefore, to give an opinion as to what is the effect of the order for a receiver with regard to the application of that act.

It further seems to me that upon this view it is unnecessary to determine what is the proper construction of the Judicature Act, as this case can, in my opinion, be decided without any reference to that act. The question has been raised whether, under the act of 1873, sect. 25, subsect. 8, a receiver might not be appointed in the original suit in this case, and as to the time at which, and the circumstances under which, a receiver may be appointed by a common law division in an ordinary action. Those points seem to me to be of the highest practical importance,

and as at present advised I decline to give any opinion upon them.

COTTON, L.J.: I am of opinion that the order of the Vice-Chancellor Hall is right. I think that much of the argument has proceeded from a want of due consideration of what the plaintiffs were really asking the court to do in this case. What the plaintiffs were asking was something for which plaintiffs came to the Court of Chancery long before the act of 1 & 2 Vict. c. 110. They were not asking the court to enforce a charge. When a person had before that act obtained a judgment the natural course was to take the ordinary legal process by writ of *elegit*; but there might be difficulties which prevented him from getting the land delivered in execution under the *elegit*, and when that was so he came into a court of equity on the well-known principle that a court of equity would give relief where a legal right existed, and there were legal difficulties which prevented the party from enforcing that right at law. That being so, it was a well-known form of suit before the act of 1 & 2 Vict. c. 110, that a plaintiff having a judgment which, owing to legal impediments, could not be enforced at law, came into equity, not for the purpose of enforcing such a right by way of charge as is given by the act of 1 & 2 Vict. c. 110, but to have what is *called equitable execu- [291] tion; that is to say, to have the lands delivered in execution to him in equity when he would have got them at law in the ordinary process but for certain difficulties existing. The leading case on the subject is *Neate v. Duke of Marlborough* (1), where the distinction is well pointed out by Lord Cottenham in giving judgment. He says (1) that "the jurisdiction is not for the purpose of giving effect to a lien which is supposed to be created by the judgment." Then he says (1), "The effect of the proceeding under the writ is to give to the creditor a legal title which, if no impediment prevent him, he may enforce at law by ejectment. If there be a legal impediment, he then comes into this court, not to obtain a greater benefit than the law, that is, the act of Parliament, has given him, but to have the same benefit by the process of this court, which he would have had at law, if no legal impediment had intervened."

Now the ordinary way by which that relief was given was by granting a receiver, and I take it to be indisputable that in a case like *Neate v. Duke of Marlborough* the court did, on interlocutory application before the hearing, grant a receiver if it thought that under the circumstances it was right to

(1) 3 My. & Cr., 407.

(2) 3 My. & Cr., 416.

(3) 3 My. & Cr., 417.

prevent the defendant from remaining until the hearing of the cause in possession of the property, of which, but for the legal impediment which forced the plaintiff to come into equity, the plaintiff would have had execution by the ordinary process.

I think it unnecessary to go through the cases. Cases have been referred to where with reference to an entirely different question, that of enforcing the equitable charge created by 1 & 2 Vict., and which would not be enforced for a year, the court interfered within the year, grounding its interference on the fact of the subject-matter of the charge being a wasting property. If those cases have any application to the present, they assume that the court had jurisdiction to interfere before the hearing, and only refer to the case of the wasting interest for the purpose of showing that it was desirable to exercise that power which the court had; for the mere fact that the property was wasting, and would probably be gone before the hearing of the cause, could not give 292] the *court jurisdiction to interfere before the hearing. If the court had jurisdiction, the wasting nature of the property was a very good reason for interfering; but if it had no jurisdiction, it could not interfere because it would be very desirable to do so.

Thus the cases stand before the act 27 & 28 Vict. c. 112, and the only question is as to the effect of that statute. The first section says: "No judgment, statute, or recognizance to be entered up after the passing of this act shall affect any land (of whatever tenure) until such land shall have been actually delivered in execution by virtue of a writ of elegit or other lawful authority." It has been decided that the appointment of a receiver will be actual delivery in execution by lawful authority, and that at the hearing a receiver may properly be granted in order to give delivery by lawful authority. But it is said that this cannot be done on interlocutory motion. I cannot accede to that fact. Before the act was passed it was the practice of the court to interfere by interlocutory motion to grant a receiver. Why should it not do so now? The case of the plaintiff is this: "I was forced to come into equity because there were legal impediments to prevent my obtaining by ordinary legal process a right which existed at the time when I filed and before I filed the bill, that is, a right to have this land delivered in execution." That being so, why is he not to have that which, independently of the act, was the relief ordinarily granted if it was a proper case. As the plaintiff had the right at the time when he filed his bill to have delivery in

execution if there had been no legal impediment, the Court of Equity ought not, in my opinion, to hesitate, if the circumstances justify it, in at once, on the filing of the bill, acting according to its usual practice, and interposing on interlocutory motion, even if that is to have the effect of giving the plaintiff delivery by lawful authority, as in my opinion it has. But even if it has not, it seems to me equally clear that a court of equity ought not to hesitate to act on its own practice, and then the effect would be this, that the court interposes because the plaintiff says, "I had a legal right at the time of the filing of the bill, which legal impediments prevented me from exercising. Do not let the delay which must necessarily ensue before the case can be decided leave the defendant wrongfully in possession of the property, dealing *with it as he thinks fit. If you cannot [293 give me the right to the property at once, keep it *in medio* until you can decide the right."

My opinion is, that the appointment of a receiver is now delivery of execution by lawful authority within the meaning of the act of 27 & 28 Vict. c. 112, and that there is nothing whatever to prevent the court from interposing on interlocutory motion. If there were any formal difficulty, in my opinion the Judicature Act, 1873, s. 25, subs. 8, removes it. Under that sub-section the court may and does grant receivers when it never could have done so before. Thus, for instance, it has power to grant a receiver under that section where a plaintiff has himself the power of obtaining possession at law.

There is another point which has been raised, namely, whether or no this relief could have been obtained in the old action. Now the only way in which that arises here is—Can it be said that the relief is so clearly obtainable in the old action as to make this application and this suit improper? Even if this relief could have been obtained in the old action, that would not make this suit an improper suit, because there was the right antecedently to institute such a suit as this, and that, as has been pointed out by the Master of the Rolls, is not in any way taken away. But I give no opinion whatever on Order XLII, or whether under that order the plaintiff can obtain a receiver as a means of enforcing a mere money order or money judgment which he has obtained in the action.

Solicitors: *G. M. Clements; Darley & Cumberland.*

[9 Chancery Division, 294.]

V.C.H., July 2 : C.A., July 6, 9, 1878.

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*DOWDESWELL V. DOWDESWELL.

[1875 D. 90.]

Practice—Parties—Administrator ad litem—Judicature Act, 1873, s. 24, subs. 7.

W., claiming to be one of the next of kin of an intestate, took out letters of administration to her estate, and divided the residue among the supposed next of kin, including himself. Afterwards W. died, and then the plaintiff, who claimed to be sole next of kin, and disputed the title of W. and the other supposed next of kin, brought a suit against W.'s executors, calling upon them to refund a fixed sum of money, which had been agreed on as the net residue of the intestate's estate come to the hands of W. as administrator; and praying that so far as might be necessary the estate of the intestate might be administered by the court. The administrator *ad litem* of the intestate's estate left unadministered by W. was made a defendant to the suit:

Held (affirming the decision of Hall, V.C.), that although the only object of the suit was to establish the title of the plaintiff as sole next of kin, a general administrator of the intestate's estate was a necessary party to the suit, and not merely an administrator *ad litem*.

In May, 1867, Maria F. Dowdeswell died intestate and unmarried.

In September, 1867, William Dowdeswell, claiming to be one of her next of kin, took out administration to her estate and divided the clear personal estate between himself and three other persons claiming also to be next of kin.

W. Dowdeswell died in December, 1870, having by his will appointed the defendants George M. Dowdeswell and E. Davis, his executors.

The present bill was filed by George Francis Dowdeswell, who claimed to be the sole next of kin to the exclusion of Wm. Dowdeswell and the other three persons among whom the intestate's estate had been divided, praying that the executors of W. Dowdeswell might pay him the sum of £6,437, being the agreed amount of the clear personal estate of Maria F. Dowdeswell (after allowing for a certain payment therein mentioned) with interest; or otherwise that an account might be taken of the personal estate of the intestate come to the hands of W. Dowdeswell; that the defendants, the executors of W. Dowdeswell, might admit assets, or else
295] *that the estate of W. Dowdeswell might be administered by the court; and that so far as might be necessary or convenient the estate of the intestate, Maria F. Dowdeswell, might be administered by the court.

The defendants by their answer took the objection that the legal personal representative of Maria F. Dowdeswell was a necessary party to the suit.

On the 21st of November, 1877, the cause came on for

hearing before Vice-Chancellor Hall, when his Lordship allowed the objection, and ordered that the cause should stand over for twelve months, with liberty for plaintiff to amend his bill in the meantime by making the legal personal representative of Maria F. Dowdeswell a party.

The plaintiff accordingly made an application to the Probate Division for the revocation of the letters of administration granted to W. Dowdeswell, and for the appointment of an administrator *ad litem*. This application was opposed by the defendants, and eventually Mr. F. W. Biscoe was nominated by the Registrar, and on the 25th of April, 1878, letters of administration of the personal estate of the intestate left unadministered by W. Dowdeswell, limited to the purposes of this suit, were granted to him.

The plaintiff then amended his bill by making Biscoe a party, and brought on the cause again for hearing on the 2d of July, 1878.

Cookson, Q.C., W. D. Rawlins, and Gibbons, for the plaintiff.

Dickinson, Q.C., and Lawson, for the defendant G. M. Dowdeswell.

Powell, Q.C., and Hull, for the defendant E. Davis.

Vernon Smith, for the defendant Biscoe.

The following cases were referred to: *Davis v. Chancellor* (¹); *Penny v. Watts* (²); *Faulkner v. Daniel* (³); *Williams v. Allen* (⁴); *Robinson v. Bell* (⁵); *Groves v. Lane* (⁶).

*HALL, V.C.: I am of opinion that this action is [296 still in a defective state as regards parties, just as it was when it was before me on the former occasion. Certainly my recollection of what took place on the former occasion was that the case was to stand over for the purpose of having a general personal representative of the intestate made a party to the suit. There was no suggestion at that time that the purpose would be answered by having a limited administrator made a party, and the order that I meant to make at that time was that the suit could not proceed without having a general personal representative. That was my view, and it is the view which I still entertain, notwithstanding the very able argument that has been addressed to me by Mr. Cookson to the contrary.

The authorities which have been referred to do not appear to me to countenance the view that, in an action like the present, a limited administrator would suffice. We must

(¹) 2 Ph., 545.

(²) 2 Ph., 149.

(³) 3 Hare, 199.

(⁴) 32 Beav., 650.

(⁵) 1 De G. & Sm., 630.

(⁶) 16 Jur., 1061.

understand all these cases with reference to the particular circumstances and facts before the court. Great reliance was placed upon the case of *Davis v. Chanter* ⁽¹⁾. In that case the whole interest which the persons whose personal representatives were required had in the litigation was, that, at the hearing of the cause before the Vice-Chancellor, some costs had been given to them, and it was said that the cause could not proceed without having those parties represented, because their having had their costs awarded to them was made a matter of complaint. That being so, having regard to the limited character of their interest in the matter, the court considered that the estate of those deceased parties would be bound generally by having a limited administrator before the court on discussing the question whether the estate of those parties ought to have costs or not. And if you look at all the cases Lord Cottenham referred to as instances in which a limited administrator would suffice, you find they are all of them cases in which the purpose was limited either in its extent, with reference to the litigation before the court, or else as to time. He says, "Administration is granted during the absence or incapacity of an executor until the will be received in England, or until it be found, for the mere purpose of transferring funds into the name of 297] the *Accountant-General; to receive a particular sum, to assign a trust term, for putting in an answer or filing a bill in Chancery, or, which is the present case, of substantiating proceedings in Chancery." The same learned judge laid down as clearly as possible in *Penny v. Watts* ⁽²⁾ that a limited administration is not sufficient in a case which, from its nature and character, according to the practice of the court, involves general inquiries as to next of kin, or general inquiries as to assets and creditors, where in fact the decree would be in that form. That is so in this particular case, notwithstanding the plaintiff addresses his claim practically to certain ascertained portions of the assets, and that he endeavors by his claim to limit the litigation with reference to those particular amounts. I take it that it would have been quite a matter of course if he could get a decree in this action, that there should be an inquiry as to debts and an inquiry as to next of kin generally in the suit, subject always to this observation, that possibly if it had been ascertained judicially in a proper proceeding that the plaintiff was the sole next of kin, some special direction might be given as to the inquiry as to the next of kin; or it might be waived altogether.

⁽¹⁾ 2 Ph., 545, 551.

⁽²⁾ 2 Ph., 149.

Then with reference to the other authority, *Faulkner v. Daniel* (¹), referred to by Lord Cottenham, the Vice-Chancellor in that case expressly puts his judgment upon this, that the party could not himself in some particular cases get general administration. There may be cases of that kind, and that might be the reason for dispensing with general administration. But at the same time he says that if you cannot get it the court will dispense with it, but if you can get it the court will not act on the limited administration. Therefore that is in substance a direct authority, as it seems to me, against the sufficiency of the limited administration.

The other case, *Williams v. Allen* (²), was a case of a very limited kind; it was a case where a tenant for life was said to have received too much, and a representative was wanted who would fight the battle in the action as to whether too large a sum had been paid over to the tenant for life or not. That was for a limited purpose, and it was considered that would suffice.

*Then the case of *Robinson v. Bell* (³), although, [298 it is true, it was decided by Vice-Chancellor Knight Bruce before Lord Cottenham's decision in *Davis v. Chanter* (⁴), is certainly a very important authority, as showing the view of the Vice-Chancellor as to the character of cases in which it would suffice to have a limited administration, and negatives the application of the rule which allows of limited administration to a case like the present. It shows that the object and purpose of the court in these cases is, not to administer the estate piecemeal, but to have a complete administration, and to administer it for the benefit of all parties whose rights come under its cognizance for the purpose of distribution.

The case before the Vice-Chancellor Kindersley of *Groves v. Lane* (⁵), although a creditor's action, is also, I consider, an important authority, as showing what the course of the court is in administering estates, and looking at that judgment I am satisfied the Vice-Chancellor could not for one moment have thought that in a suit framed like the present the estate would be sufficiently represented by a limited administrator.

The proceedings which have taken place in the Probate Court in reference to this case seem to me to have taken place—indeed I am satisfied they must have taken place—

(¹) 8 Hare, 199.

(²) 32 Beav., 650.

(³) 1 De G. & Sm., 630.

(⁴) 2 Ph., 552.

(⁵) 16 Jur., 1061.

without any substantial discussion on the question whether, when the case came back to this court, the court would consider what had been done sufficient to perfect this action. I am quite satisfied the judge of the Probate Court really never took that into his consideration. He never meant to say, "The Vice-Chancellor, when it goes back to him, will be satisfied that this representation will make the action in his court complete, and the plaintiff will be entitled to proceed without discussion as to the sufficiency of what has taken place here."

It is said that the view taken by me does not do justice to the plaintiff in this case. It is suggested that there is or may have been a loss of evidence for the purpose of substantiating his case as sole next of kin on an application made by him for a general grant. I have said in the course of the argument, in effect, that I do not think the plaintiff 299] has any right to complain on that *account. He commenced this suit; very soon after its commencement he had his attention drawn by the answer to the imperfection of his suit, to the impossibility of its proceeding without having a legal personal representative. The suit went on, however, without it till it came before me, the plaintiff being fully aware from the beginning of the necessity of that course, and the proper course for him to take from the beginning was to have proceeded to obtain administration before the commencement of his action, or, at the very utmost, he might have excused himself, if he could have done so at all, by saying there was no legal personal representative constituted, but proceedings were being taken for that purpose, and that the representative would be made a party if and so soon as the representation was obtained. But he had no right to leave that, as he has left it, for several years from the commencement of his action, first trying to do without it altogether, and then doing that which I hold to be insufficient and imperfect, and leaving the matter exactly where it was when the case was before me on the former occasion.

It seems to me, therefore, that this action as it stands at present cannot proceed; that has not been done which I ordered to be done, that is to say, that the case should stand over for twelve months, with liberty to the plaintiff to amend in the meantime by making the legal personal representative of Maria Frances Dowdeswell, the intestate, a party to the suit. I hold that to mean, not a limited personal representative, but a general representative of the intestate. The plaintiff may take such course as he may be advised.

The order is apparently not at present worked out or exhausted. Of course I should, if asked, give the plaintiff liberty further to amend. He must amend at once in order to comply with the order.

From this decision the plaintiff appealed. The appeal came on to be heard on the 6th of July.

Cookson, Q.C., Rawlins, and Gibbons, for the appellant: The grant of administration *ad litem* is sufficient representation of the intestate for all the purposes of this action. The object of the action is not the general administration of the intestate's estate, but solely the determination of the right of the plaintiff to *a particular fund, which right de- [300] pends entirely upon the question who are the next of kin of the intestate. If the plaintiff, having established his title, were to go on to ask for the general administration of the estate, it may be that he would be stopped for want of a general administrator, and in that case such an administrator may be added to the record under Rules of Court, 1875, Order XVI, rule 13; but at this stage of the proceedings the administration *ad litem* is quite sufficient. Even before the Judicature Act, in such a case as this, limited administration would have been sufficient: *Davis v. Chanter* ('); *Ellice v. Goodson* ('); *Robinson v. Bell* ('). In *Groves v. Lane* ('), where administration *ad litem* was held insufficient, full administration of the estate was required. When a testator dies intestate his personal property vests in the court, as it formerly did in the Ordinary, and the court grants it to the administrator, whether *ad litem* or generally: *Williams on Executors* ('); 21 & 22 Vict. c. 95, s. 19. An administrator *ad litem*, as the officer of the court, has the whole personal estate vested in him, although he is only to act for the purposes of the particular suit. Subject to that restriction, he has full power over it. But our case is stronger, being under the Judicature Act, 1873. The technical difficulty which previously existed is now removed. The Chancery Division can now grant letters of administration as well as the Probate Division, and can carry on the investigation as to who are the next of kin as well as the Probate Division. We desire to determine that question in the Chancery Division, for this, among other reasons, that evidence *de bene esse* of witnesses who are now dead has been taken in the suit. If we have to take out general administration in the

(') 2 Ph., 545.

(') 2 Coll., 4.

(') 1 De G. & Sm., 830.

(') 16 Jur., 1061.

(') 7th ed., pp. 401, 402, 524.

Probate Division, we shall have to try the whole question as to the next of kin in that division. It was the object of the Judicature Act to avoid suitors being sent from one court to another.

Dickinson, Q.C., and *Lawson*, for the defendant G. M. Dowdeswell,

Powell, Q.C., and *Hull*, for the defendant E. Davis, and *Vernon Smith*, for the defendant Biscoe, were not called on. 301] *JAMES, L.J.: For myself, I am obliged to say that I have always considered, and do still consider, that the point decided by Vice-Chancellor Hall was as well established in law and in the practice of this court before the Judicature Act as the legal proposition that the eldest son is the heir-at-law at common law in respect of all the lands not gavelkind, and that all the sons are heirs-at-law in respect of gavelkind lands. It was not only the practice, but it was established by authority, that for a general administration a general administrator is required. Exceptions were allowed in certain particular cases in which a limited administrator was allowed to represent the estate; but in all those cases he was allowed to represent it for the purpose of having a particular question in which that estate was interested determined so as to bind the estate in the hands of a general administrator when appointed. But the general rule was so well established, that, as Vice-Chancellor Kindersley said, in *Groves v. Lane* (¹), though for 200 years the Ecclesiastical Courts had been in the habit of granting limited administration, yet during the whole of those 200 years no case had ever been found in which a general administration had been granted in a suit with a limited administrator. What Vice-Chancellor Kindersley said as to the 200 years, more or less, which had elapsed at that time, is equally true of the twenty-five years which have elapsed since Vice-Chancellor Kindersley's judgment.

Before the Judicature Act, then, it seems to me that this rule was well established, and could not be reasonably arguable. The question is whether there is any ground for saying that the Judicature Act has altered the course and practice and established law of this court. That must be found in the act itself. It must be something which expressly, or by necessary implication, has altered that which was the established rule. It is said that the Judicature Act prescribes a sort of general principle as a rule for our guidance and the guidance of all courts, that there is to be no multiplicity of actions, and a man is not to be sent from one

(¹) 16 Jur., 1061.

court to another. As a general rule no doubt the Legislature has said that where there is a question of law or equity which can be tried it ought to be tried. But there is a particular branch of the court that is *appointed for the [302 purpose of granting administrations and probate of wills, and a person cannot at his will and pleasure, or his caprice, transfer the jurisdiction from that branch of the court to some other branch, because he says, "It is convenient that I should have that determined at the same time that I have something else determined in another branch of the High Court of Justice." A man cannot transfer the jurisdiction in that way.

It is said that in this case there is some hardship on the plaintiff. The answer to that was given by Vice-Chancellor Hall in his judgment. The plaintiff knew perfectly well at the beginning that he would be required to have a general administrator, and he ought to have taken proceedings to have a general administrator appointed; because in this particular case his case is that he himself is entitled to the general administration, and it was always sufficient to say that a limited administrator was not enough where a plaintiff has power to obtain general administration if he thinks fit. If he had taken such proceedings he would not have been exposed to the difficulty which it is said he is now exposed to, of having lost some of his evidence; in the meantime I cannot bring myself to doubt that the Vice-Chancellor Hall was quite right, and his order must be affirmed with costs.

BRETT, L.J.: It seems to me that the first point to be considered is what is the nature of this bill of complaint. It states certain facts which, if they be true, I apprehend would entitle the plaintiff to the relief he asks, and that relief, upon the face of the bill, is a general administration. Therefore the decree asked for is a decree for general administration. In the words of Vice-Chancellor Kindersley, what would be the result of a decree made giving the relief asked for by this claim? It would be a general administration. The next question to be asked is, what is Mr. Biscoe? He is not general administrator, he is an administrator for a limited purpose.

That being so, what was the law of the Court of Chancery before the Judicature Act? I apprehend it was that upon a bill so framed, asking such relief with such a party to it, the court would not enter upon the inquiry. That was a valid preliminary objection. Now, it is said that the latter is wholly a technical objection *in the Court of Chan- [303

cery. If you look at Vice-Chancellor Kindersley's judgment in *Groves v. Lane* on the first hearing (¹), it seems to me that he gives reasons which take it far beyond being a mere technical objection, because he points out that if the court grants the relief asked for by the bill, it has a person before it whom it cannot order to carry it into effect. If that be true, it is more than technical; but supposing it is technical only, you have the declaration by Vice-Chancellor Kindersley, when the case was before him the second time, that for 200 years the Court of Chancery had always refused to enter upon such a suit with such a representation. That has not been denied. But what is the difference between that case and the present? That was the first time in 200 years, and this is the second time in 225. That is the only difference between the two cases. Therefore, as it seems to me, under the old system the objection here made before the Vice-Chancellor would have been valid, although the Probate Court had granted such letters of administration to Mr. Biscoe as the Probate Division has now granted.

But then it is said that has been altered by the Judicature Act. Now, I do not undertake to say whether the Vice-Chancellor could have granted letters of administration to anybody, as has been suggested in the argument; for the present I take leave, with the greatest respect, to reserve my opinion upon that point. But supposing he could, he was not asked to grant them, and if he had granted them the same difficulty would have arisen. I doubt very much if the old Court of Probate would have granted general letters of administration to Mr. Biscoe, and if they would not, I do not think the Vice-Chancellor could have granted them. And if he had granted limited letters of administration to Mr. Biscoe in his court, precisely the same objection would have arisen as now. Therefore the Judicature Act, even though it has taken away the distinction of courts, does not assist this case at all, unless it can be said to be a mere technicality which the Judicature Act has done away with.

Now, as I said before, I doubt whether this is a mere technicality, but supposing it is, if it was a technicality which had grown into a rule of practice of the court 304] which an appeal court *before the Judicature Act would not have set aside or altered, the Judicature Act does not enable this court to set it aside now; it must remain according to the old rules; and according to the old rules this gentleman does not sufficiently represent the

(¹) 16 Jur., 855.

intestate in this suit, and the suit cannot go on, and must be stopped.

COTTON, L.J.: The question is whether or no the estate of the intestate, whose personal property the plaintiff is claiming, is sufficiently represented in this suit. It arises on a bill filed before the Judicature Act, and the first question I will consider is, whether or no, before the Judicature Act, this suit would have been sufficiently constituted, in other words, whether the defendant Biscoe would sufficiently have represented the estate of the intestate, so as to enable a decree to be made on this bill.

I consider it well established, that where you want an administration of an estate you must have, not a mere limited administrator, but a general administrator, that is to say, a person constituted by the proper authorities for the purposes of collecting and dealing with the assets; and the distinction is obvious between a case of administration and a case where in the suit the plaintiff simply wishes to establish that he has a claim against a person who is dead for the purpose of defending the estate. In that case a limited administrator is sufficient, because the suit involves no kind of administration, but simply the decision of the question whether or no the plaintiff has or has not a good claim against the estate of the deceased. That is a distinction which has been constantly observed and frequently laid down. I think I need not go again through the cases which have been referred to.

Then Mr. Cookson admitted that he, in this case, prayed for and required an administration decree, and unless he can in any way take it out of the rule which I have laid down, that would be fatal to the contention that the limited administrator is sufficient for the purposes of the suit. How he tried to put it was this, that the limited administrator was sufficient for the purpose of deciding a preliminary point in the suit, namely, whether or no his client was, as he alleged, the sole next of kin of the deceased. I apprehend that cannot be done. You must look and see what the suit seeks. *It seeks, as he admits, a general [305 administration, and it is only for the purpose of granting that administration and distributing the estate that the court in this suit goes into the question whether or no the plaintiff is or is not next of kin, and I apprehend it would be contrary to the course of the court to enter into the litigation in the suit when it had not before it the proper parties to enable it to make a decree. It is not as if the question of kinship was in an administration suit one distinct subject of

litigation, but, for the purpose of administering and distributing the estate in the suit, the court directs an inquiry as to who are the next of kin, as part of and in the front of the very decree which afterwards directs the accounts and inquiries as to the estate, which, without the proper person before it, could not be made. That being so, you cannot divide the suit; you must have parties, according to the practice of the court, sufficient to enable the court to make the decree, which, if that preliminary inquiry was waived, would have to be made at the hearing.

The only remaining question is, whether the Judicature Act or the Probate Act has in any way altered the matter. The Probate Act I only mention to show that I have not omitted it. In my opinion that act makes no difference whatever. It simply gives power to grant limited administration to the Court of Probate, and puts the Court of Probate in the same position as the court, for the purpose of granting administration, was in before, both with regard to vesting estates, and with regard to the particular power of granting these limited administrations.

With respect to the Judicature Act, it is said that it is improper for any branch of the High Court to say that this does not sufficiently represent the estate for the purposes of the suit, because another branch of the High Court has decided that it does. Now that is not so; the case would come before the court both before the Vice-Chancellor in the court below and here, just the same as if any Vice-Chancellor, or Vice-Chancellor Hall himself, having power to grant, had granted this. When parties apply to the court for the purpose of appointing a person, an officer of the court if you please, for the purpose of taking a particular proceeding, or for the purpose of effectually constituting the suit, if that is done *ex parte*, of course it is taken at the 306] risk of the *person who so applies; and when the suit comes on, even if it is not taken *ex parte*, it will be without prejudice to having it decided in the suit, whether or no the person so appointed is appointed with sufficient powers duly to constitute the suit. It is really this, that when the parties have asked the court to make a particular order appointing a receiver with particular powers, they have to take the risk of that afterwards not being found sufficient for the purpose for which they desire it, namely, for the purpose of proceeding with some other litigation; and it is no more derogating from the power of the Court of Probate to say that these letters of administration are not sufficient in this court than it was in former days, when you inquired

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into the question whether the letters of administration granted by the Ordinary were sufficient, and you found they were not. So in the present case the Vice-Chancellor has found that what has been granted by the Probate Division of the High Court, although it is limited to the purposes of the suit, is not such a representation of the estate as, according to the ordinary practice of the court, is required where you have a general administration. I doubt whether the judge of the Probate Division ever intended to decide, as between the parties to the litigation here, that the Court of Chancery was bound to hold that by granting this form of administration he had constituted somebody sufficient to enable the court to make a decree, for which, according to its ordinary practice, it required, not such an administrator, but a general administrator with power to proceed and get in the estate. There is nothing in the Judicature Act which enables us in this respect to depart from the ordinary course of the court. That act has dispensed with some technicalities, but it has not dispensed with this, if it is a technicality. It is still necessary, as it was before, that in a suit like this, involving administration, there should be, not a limited administrator, but a general administrator, in order to enable the court to make a decree in the suit.

Solicitors for plaintiff: *Hayes, Twisden, Parker & Co.*

Solicitors for defendants Dowdeswell and Davis: *Redpath & Holdsworth.*

Solicitor for defendant Biscoe: *Edward George.*

[9 Chancery Division, 807.]

C.A., July 11, 1878.

**Ex parte* CULLEY. *In re* ADAMS. [307]

Petitioning Creditor's Debt—Trustee for Absolute Beneficial Owner—Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), s. 6—Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25, subs. 6.

Notwithstanding the provision of sect. 6 of the Bankruptcy Act, 1869, that "the debt of the petitioning creditor must be a liquidated sum due at law or in equity," the old rule in bankruptcy remains in force, that where a debt is vested in a mere trustee for an absolute beneficial owner who is capable of dealing with the debt as he pleases, the trustee cannot alone sustain a petition for adjudication of bankruptcy against the debtor, but the beneficial owner must join in the petition.

The rule, however, does not apply to a trustee for persons under disability.

The A. & E. Bank obtained a judgment against the respondent, which was not satisfied; and afterwards it assigned all its debts and assets to the

C. Bank, at a valuation to be agreed upon. Before valuation made, the A. and E. Bank petitioned for the sequestration of the respondent's estate:

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C.A.

Held, that notwithstanding the assignment, it had a sufficient debt at law or in equity to constitute it a good petitioning creditor.

The English principle (stated in Ex parte Cully, 9 Ch. Div., 307), requiring

the joining of a trustee and beneficial owner in a petition for sequestration does not hold in this colony: In re Jeremiah Dwyer, 5 Vict. Law Rep., I. P. & M., 98.

[9 Chancery Division, 312.]

C.J.B., April 15: C.A., May 23, 1878.

312] *Ex parte BOLLAND. In re DYSART.

Undischarged Debtor—Fresh Trading—Credit obtained on Faith of Representations of Trustee—Assent of Creditors—Right of Trustee to Debtor's Property.

D. & C., who traded in partnership, filed a liquidation petition on the 4th of December, 1876. On the 19th of December the creditors resolved on a liquidation by arrangement, appointed B. trustee, with a committee of inspection, and resolved that the debtors' discharge should be granted upon the committee of inspection and the trustee certifying that they were entitled to it. On the 3d of January the committee resolved that C. should be allowed to realize the stock-in-trade and to collect the debts due to the estate, under the supervision of the committee, for six months from that day, the committee receiving the proceeds; that, if 7s. 6d. in the pound and the costs of the liquidation were thus realized, a further 7s. 6d. in the pound should be accepted from C. for the remainder of the estate, if it was paid within three months; that D. should be allowed his discharge, subject to the payment of his private debts, and that C. should have his discharge on payment of the 15s. C. realized the stock-in-trade and the debts, and out of the proceeds paid £719 to the committee, and £60 to the trustee for his costs of the liquidation. The £719 was not enough to pay the first 7s. 6d., but that was in fact paid soon after it became due to all the creditors who had proved. There were only eight of them. The debtors' bankers, to whom they owed £251 at the commencement of the liquidation, did not prove, because they were amply secured by a mortgage of real estate of C., which he had executed in favor of the bank in February, 1876, to secure moneys advanced by them to him or to his firm. In February, 1877, C. commenced trading again alone. Seven of the old creditors dealt with him again and gave him credit. Before he recommenced business he applied to the bank to give him credit on the security of the mortgage. The bank manager had an interview with the trustee, and asked him whether the bank might not safely deal with C. The trustee told him that the matter was quite out of his hands, and that it would be all right. The bank then agreed to give C. fresh credit. The second instalment of 7s. 6d. was not paid when it became due. The creditors applied for payment to C., not to the trustee, but did not take any steps to enforce payment. Ultimately C. paid the second instalment to one of the creditors and part of it to some of the others, making the payment in part by means of checks on the bank. In July, 1877, the mortgaged property was sold by C., with the consent of the bank, for £1,180, which was paid to the bank and carried to the credit of C.'s account. In August, 1877, he was adjudicated a bankrupt. At the end of July, 1877, the trustee's solicitor had claimed the £1,180 from the bank. After the adjudication the trustee in the liquidation applied to the county court for an order that the bank should pay the £1,180 to him. The judge ordered the bank to pay over the balance, after deducting the debt due to them by the

313] *firm of D. & C. and the advances made by them to C. after the date of the liquidation petition:

Held, by Bacon, C.J., and by the Court of Appeal, that, having regard to the representations made by the trustee to the bank, and the conduct of the creditors, the bank were entitled to retain out of the purchase-money the advances which they had made to C. since the filing of the liquidation petition.

Per BAGGALLAY, L.J.: Upon the principle of *Troughton v. Gilley* ⁽¹⁾, the representations made by the trustee would of themselves have been sufficient to give the bank the right which they claimed.

Per BRAMWELL, L.J.: The principle of *Troughton v. Gilley* did not apply.

JOHN DYSART and John Carragher carried on in partnership at Liverpool the business of provision merchants. Their bankers were the Adelphi Bank, Limited. On the 29th of February, 1876, Carragher, in consideration of advances already made and of advances to be thereafter made to him alone or to his firm, and to secure the balance which at any time might be due to the bank by him alone or by him jointly with any copartner of his, mortgaged to the bank some real estate in Londonderry belonging to him, and some policies of assurance. The mortgage deed contained a power of sale.

On the 4th of December, 1876, Dysart and Carragher filed a liquidation petition. The first meeting of the creditors was held on the 19th of December, when it was resolved that the affairs of the debtors should be liquidated by arrangement; that Henry Bolland should be appointed trustee of their property; that Edwin Whitworth and John Hargreaves (two of the creditors) should be appointed a committee of inspection; and that the discharge of the debtors should be granted upon the committee of inspection and the trustee certifying that they were entitled thereto. On the 3d of January, 1877, the committee of inspection passed the following resolutions:—

“That one of the debtors, namely, John Carragher, be allowed to realize the stock-in-trade, and collect the debts due to the estate under the supervision of the committee of inspection for the space of six months from this day, the committee receiving all proceeds as realized.

“That, in the event of the stock-in-trade and debts realizing *7s. 6d. in the pound and the costs of the liquidation proceedings, an amount sufficient to pay a further sum of 7s. 6d. in the pound be accepted from the said John Carragher for the remainder of the estate, provided it is paid within three months from this day.

“That John Dysart be allowed his discharge and furniture, subject to the payment of his private debts.

“That John Carragher also be allowed his discharge on payment of the aforesaid 15s. in the pound.”

Dysart obtained his discharge on the 24th of January, 1877. After the passing of the resolutions of the 3d of January, Carragher proceeded to realize the stock-in-trade, and to

(1) Amb., 680.

collect the debts, and he at various times paid to the committee of inspection, from the proceeds of the realization, sums amounting altogether to £719 8s. 9d., and he also paid to Bolland £60 for his costs of the liquidation. This sum was not sufficient to pay the creditors the first instalment of 7s. 6d. in the pound, which amounted to about £950; but that instalment was, with the aid of other moneys furnished by Carragher, paid, soon after it became due, to all the creditors who had proved, who were only eight in number. The amount due from the debtors to the bank at the date of the filing of the petition was £251 7s. 6d. The bank, being fully secured, did not prove in the liquidation. In February, 1877, Carragher commenced business again alone at a new place of business, and seven of the eight creditors renewed their dealings with him, and gave him fresh credit. Before commencing his new business he, on the 21st of February, 1877, had an interview with Mr. Harrison, the manager of the bank, and told him that he was about to start in business on his own separate account, and asked Harrison to allow him to open an account with the bank. He said that his creditors had handed the estate back to him, and that he was to pay them 15s. in the pound by two equal instalments, and that he wished to be allowed to overdraw his account to the extent of £500, and to have discount to the extent of £750 against the securities which he had already given to the bank. Harrison told him that he could do nothing until he had consulted the committee of the bank, and had communicated with Bolland. Harrison then called upon Bolland, and (according to Harrison's evidence) told him of Carragher's request, and asked him whether Carragher's statement with 315] *regard to his estate was true, and whether the bank might safely deal with him. Bolland replied, "Yes; the matter is quite out of my hands, and it will be all right. Mr. Hargreaves seems to have taken a great fancy to Carragher, but I don't understand why." Bolland, in his evidence, said that he could not pledge his memory as to what passed at this interview, but he said that he told Harrison that Carragher's affairs were practically out of his hands. He admitted that something might have been said about Carragher's opening an account with the bank, but he said that he never agreed the bank should hold the securities to cover future advances. Harrison the next day informed the bank directors of Carragher's request, and repeated to them what Bolland had said, and they then agreed to accede to Carragher's application, and accordingly £500 was placed to the credit of his current account, and the bank also discounted bills

for him. On the 22d of February he drew a check for £150, in part reduction of the balance of £251 7s. 6d. due from his late firm to the bank. He continued to carry on business alone until August, 1877, when he was adjudicated a bankrupt. During this period the seven old creditors continued to deal with him, and gave him credit. He availed himself of the credit given to him by the bank. He did not pay the second instalment of 7s. 6d. in the pound when it became due, and the creditors took no steps to enforce its payment. But before the adjudication he had paid the whole of the second 7s. 6d. to one of the creditors, and had paid part of it to some of the others, and he made these payments partly by means of checks upon the bank. There was evidence that the creditors applied for the second 7s. 6d., not to Bolland, but to Carragher. On the 25th of July, 1877, Carragher drew a check for £101 7s. 6d., the balance of the debt due from his late firm to the bank, and applied it in payment of that balance.

In July, 1877, Carragher, with the consent of the bank, sold the property in Londonderry, and on the 18th of July the bank executed a reconveyance of the property to him. The purchase-money, amounting to £1,180 was received by the bank, and was carried to the credit of Carragher's account. At the time of the adjudication there was a considerable sum due from him to the bank. At the end of July, 1877, Bolland's solicitors on his behalf *made a claim [316 upon the bank for the £1,180, the purchase-money of the Londonderry property. The bank asserted that they were entitled to retain out of that sum the amount of the advances which they had made to Carragher since the commencement of the liquidation, as well as the balance due to them from the firm of Dysart & Carragher at the time when the petition was filed. Bolland then applied to the Liverpool County Court for an order that the bank should pay over the £1,180 to him, and deliver to him the policies of insurance, as being part of the estate of Carragher vested in Bolland as trustee. The bank did not claim the policies. The judge ordered the bank (after deducting their costs) to pay over to Bolland the sum of £146 4s. 4d., the balance of the £1,180 in their hands, after deducting all moneys due and owing to them from Carragher, with interest, and to deliver up the policies. Bolland appealed to the Chief Judge. The appeal was heard on the 15th of April, 1878.

Winslow, Q.C., and T. H. James, for the appellant: The trustee acted under the directions of the committee of inspection. There is no duty on the part of the trustee to

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look after an undischarged debtor: *Ex parte Ford* ⁽¹⁾. Except under sect. 28 of the Bankruptcy Act, 1869, the trustee could not sell the estate for a composition. As to the validity of the security, they cited *Baillie v. M'Kewan* ⁽²⁾; *Parker v. Clarke* ⁽³⁾. As to the effect of a second adjudication, they cited *Ex parte Charlton* ⁽⁴⁾.

The trustee never intended to give up his right to this security, which was the only security the creditors had for the payment of the second instalment. The trading again by the debtor cannot affect this security.

De Gez, Q.C., and *W. R. Kennedy*, for the bank, were not called on.

BACON, C.J., after stating the facts, continued :

I am far from adopting the opinion that it is the duty of a trustee so to watch the debtor and to track his conduct, 317] as that, if he *can be seen carrying on his business or entering into any engagements, the trustee must be taken to know that. That is not a part of the trustee's duty; but this is plainly the duty of a trustee for the creditors, in whom is vested all the debtor's estate, to see that no part of that estate is misapplied.

[His Lordship then referred to the evidence relating to the interview between Harrison and Bolland, and continued :]

The question then comes to this. A trustee in bankruptcy, who is asked by bankers dealing in the ordinary way of their trade whether it is safe for them to enter into transactions in the shape of an account with the debtor, says, "You may do it with perfect safety. I have no objection to make." They adopt what he says to them; they open a banking account with the debtor, to which they carry the £1,180 that was transmitted to them, and then comes a time subsequently when the debtor becomes bankrupt, and Mr. Bolland's vigilance is very naturally excited, and he claims all that he, as Carragher's trustee, can claim. The question is, whether he is at liberty to overlook, abrogate, and pass by all these transactions into which he had induced Mr. Harrison to enter. I do not use too strong a phrase when I say "induced," for without his representations Mr. Harrison would never have opened the account with Carragher. I do not think it is in the least degree unreasonable, considering the powers and the duties of Mr. Bolland, that he should not be able now, after that interview with Mr. Harrison, and with as much knowledge as it is clear he must have possessed on the subject, to treat the account as if it

⁽¹⁾ 1 Ch. D., 521.

⁽²⁾ 35 Beav., 177.

⁽³⁾ 30 Beav., 54.

⁽⁴⁾ 6 Ch. D., 45.

had been an account with him. I think that the learned judge has dealt with the case properly, and that the objections raised to his order cannot be sustained. The appeal will be dismissed with costs.

From this order the trustee appealed. The appeal was heard on the 23d of May, 1878.

Winslow, Q.C., and *T. H. James*, for the appellant: The trustee did nothing to mislead the bank. Harrison ought to have looked at the resolutions of the committee of inspection before he gave fresh credit to Carragher. If the trustee did *mislead the bank they may have a remedy by action against him, but the rights of the creditors are not affected. The trustee had no power to give the bank a charge on the debtor's property by a mere loose conversation.

De Gex, Q.C., and *W. R. Kennedy*, for the bank: The order appealed from is in accordance with the principle of *Troughton v. Gitley* (1); *Tucker v. Hernaman* (2); *Engelback v. Nixon* (3); *Ex parte Ford* (4). Indeed *Troughton v. Gitley* goes further than is necessary for the present case. Here the trustee made an actual representation to the bank, on the faith of which they acted. There were only eight creditors under the liquidation, and they all knew that they could only be paid by means of advances made by the bank. If the trustee had said nothing, but had merely stood by, that would have been enough. *Ex parte Tinker* (5) is another illustration of the principle. The trustee can bind the creditors by any equity which affects himself. It would be contrary to good faith and common honesty, after the representations made by the trustee to the bank, they should be deprived of this money. The doctrine of *Pickard v. Sears* (6) applies. If a man is allowed to commence trading again, an implied power is given to him of obtaining credit or advances from his bankers. And the creditors have by their conduct affirmed that which was done by the trustee. Even if the trustee could have intercepted the proceeds of the sale of the property, he cannot now recover it from the bank to whom it has been paid: *Ex parte Dewhurst* (7). Independently of the representations made by the trustee, the bank are entitled to retain this money, for they have given full value to the creditors for it.

(1) Amb., 620.

(2) 4 D. M. & G., 395.

(3) Law Rep., 10 C. P., 645; 14 Eng. Rep., 481.

(4) 1 Ch. D., 521.

26 ENG. REP.

(5) Law Rep., 9 Ch., 716; 15 Eng. Rep., 440.

(6) 6 A. & E., 469.

(7) Law Rep., 7 Ch., 185; 7 Eng. Rep., 504.

Winslow, in reply: Sect. 26 of the Bankruptcy Act, 1869, authorized the resolution which allowed Carragher to wind up the estate. The principle of *Troughton v. Gitley* applies to the earnings of an undischarged bankrupt; it has never yet been extended to property which he had at 319] *the time of the adjudication. If the doctrine is to be thus extended it will be difficult to act upon sect. 26 at all. It is not the duty of the trustee to watch the proceedings of the bankrupt, except with regard to property intrusted to him for realization: *Ex parte Ford* (*). *Ex parte Dewhurst* (*) is distinguishable. There an undischarged bankrupt had paid money for valuable consideration, and it was held that the money could not be followed in the hands of the payee.

JAMES, L.J.: The case has been very ably argued, and all the points have now, I think, come out pretty clearly.

The result, to my mind, and, I believe, to the minds of my learned colleagues, is, that we cannot differ from the findings of the two courts. I would say more distinctly that we cannot differ from the finding of the county court judge, who, as it appears to me, has rightly summed up the evidence and drawn the proper conclusion from it, to this effect, which I may state shortly as being the inference which I myself draw from all the facts, not only from the conversations between Mr. Harrison and Mr. Bolland, but from all the facts and circumstances in the case. It comes to this—that the trustee, with the full assent of the creditors, left the property to be dealt with by the debtor as if it were his own, a good consideration moving them thereto. The bank was informed of the facts and acted upon them, trusting not only to the words, but to the conduct of the parties.

I think that, under such circumstances, it is impossible for the trustee to complain of what the bank did in good faith, and what his own language and the conduct of the creditors induced them to do.

BAGGALLAY, L.J.: I entirely concur.

BRAMWELL, L.J.: I also concur. I wish, however, to state the reasons for my concurrence, because I was for a 320] considerable time in favor of *the appellant, and I should have continued to be so if the case had rested on a mere talk between the appellant and Mr. Harrison. I should, I confess, have thought it a most mischievous thing to act upon such a ground as that, when the bank might have had an opportunity of satisfying themselves of what

(*) 1 Ch. D., 621 529.

(*) Law Rep., 7 Ch., 185; 7 Eng. Rep., 504.

the actual facts were. I am of opinion that Mr. De Gex's argument, founded on *Troughton v. Gitley* ⁽¹⁾ (with which case and its progeny he entertained us to our great delight at Westminster some time ago), does not touch the present case. But I entirely agree with the reason of the decision given by Lord Justice James, and why I do so, I wish to say because I indicated an opinion or showed a tendency favorable to the appellant for a considerable time. I wish to show why I have changed my opinion, not upon the ground on which it was originally formed, but upon a new consideration which has presented itself. All the creditors but one of this debtor continued to deal with him. That one was a creditor for only £28, and ten guineas would have satisfied his second 7s. 6d. in the pound. One can very well understand that those creditors who continued to deal with the debtor, or were desirous that he should go on, did so and were so because he was and would be a customer. But how was he to go on and to trade with them? How was he to realize his second 7s. 6d. in the pound? Of course he might borrow it, he might find friends to lend it to him. But one very easy means of his paying the second 7s. 6d. and starting afresh in business would be to hand over to him the power of disposition of the equity of redemption of the mortgaged property, and allow him to deal with it.

Now what do we see? In the first place, the trustee gets his costs paid as though he was done with. In the next place, although the second 7s. 6d. in the pound ought to have been paid by the beginning of April, it was not paid. No complaint was made by any of the eight creditors, seven of whom were dealing with him, and the other being a person of very small consequence who may almost be left out of consideration. No complaint was made, no step to enforce payment was taken by any of the creditors. In addition to that, we have the statement made by the trustee to Harrison, which, as I have said, I should not have been prepared *to act upon if it had stood alone. He said, [321 and said truly enough, if my view of the facts is the correct one, "the liquidation is ended." Or he might have expanded it, and said, "All his creditors but one for a small amount, about whom we did not trouble ourselves, are dealing with him afresh. My costs are paid, and the man is starting afresh." I think that is the purport of what Mr. Bolland said. I believe him fully, and I believe Mr. Harrison too. It seems to me that the representation was in accordance with

(1) Amb., 630.

the facts—"The thing is practically ended, the man is his own master, and is entitled to the equity of redemption, and will settle separately with his creditors. It appears that he has paid the second 7s. 6d. in the pound to one of them, and to the rest partly, and that they took it direct from him, and not through the trustee.

Well, then, in addition to that, it must be borne in mind that, although the trustee knew of the existence of this mortgaged property, because it was mentioned in the debtor's statement of affairs, and was estimated at £855—although he knew of its existence, he made no claim to it until the debtor was about to stop again, or was insolvent, and had shown that the second 7s. 6d. in the pound was in jeopardy. Upon these considerations I come to the conclusion, which has been enunciated by Lord Justice James, that the liquidation as a liquidation was at an end, and that the man was allowed to deal with his remaining property in such a way as he thought fit, with the assent of the trustee and the creditors. As to whether the £28 creditor will have any claim against the trustee for not getting in his second 7s. 6d. in the pound, it is unnecessary to express any opinion, but one can very well understand that that small amount was disregarded.

I am of opinion, therefore, that the judgment of the Chief Judge should be affirmed.

BAGGALLAY, L.J.: I have already expressed my general concurrence in what fell from Lord Justice James, and I agree with almost everything which has been said by Lord Justice Bramwell, with one exception, which I think it right to mention. I cannot agree with him in thinking that the 322] principle of *Troughton v. Gitley* (1) is not *applicable to the present case; for I think it does apply, and that it supports our judgment.

Appeal dismissed with costs.

Solicitors for trustee: *Burton, Yeates & Hart*, agents for Tyrer, Kenion & Tyrer, Liverpool.

Solicitors for bank: *Brook & Chapman*, agents for T. Goffey, Liverpool.

(1) Amb., 630.

See 4 Eng. R., 424 note; Matter of European Bank, 4 Eng. R., 745.

Where one, who had given his bond and mortgage to a savings bank, was also a depositor therein, and the bank became insolvent, and a receiver was appointed; held, that the mortgagor

was entitled to a credit on his bond of the amount of his deposit at the failure of the bank: *New Amsterdam Savings, etc., v. Tarter*, 4 Abb. N. C., 215.

In a suit by assignees under a voluntary assignment for the benefit of creditors, upon a note to the assignor which

did not fall due until after the assignment, the creditor may set off a debt due to him by the assignor at the time of the assignment.

S. made his note for \$350, June 18, 1876, at ninety days, which the bank discounted and held on and before the maturity of the note. S. had a running account of deposits in the bank before and during the running of this note, on which there was a balance due him on September 6, 1876, of \$395.50. The bank made a voluntary assignment for the benefit of creditors on the 7th of September, 1876. In a suit by the assignees upon the note, held, that S. had the right to set off the deposit against the note: *Jordan v. Sharlock*, 84 Penn. St. R., 366, distinguishing *Boesler v. The Exchange Bank*, 6 Penn. St. R., 32.

A banker, who was a director of an insurance company, can set off its demand for money it deposited with him, bearing interest, and payable on call, against the amount due on its policies issued to and held by him. The company having been adjudicated a bankrupt, his right to such a set-off is equally against its assignee: *Scammon v. Kimball*, 92 U. S., 362.

The relation existing between a bank and its depositor on current account is that of debtor and creditor. Accordingly, where a bank held a note against a depositor at the time of his death, which was larger in amount than the sum on deposit, the bank might present its claim in the probate court and have a balance struck between the two demands. The allowance thus entered is *res adjudicata*, and is conclusive against an action by the administrator to recover the money on deposit: *Knecht v. U. S. Savings Inst.*, 2 Missouri App. Rep., 563.

The plaintiff opened an account with the defendants, as bankers, by getting them to discount for him two acceptances for \$500 each, payable to and indorsed by him, and to place the proceeds to his credit.

He afterwards paid in a further sum, and had drawn out by checks all except \$403, when the two bills were returned dishonored. Held, that the defendants were entitled to apply the balance in hand in part payment of the acceptances; and, therefore, that hav-

ing done so, they were not liable for refusing to honor the plaintiff's check: *Jones v. Bank of Montreal*, 29 U. C. Q. B., 448.

A person who was indebted as principal upon a promissory note to a banking firm, after the maturity thereof deposited in the bank of said firm, where said note was payable, and checked out sums amounting to more than said indebtedness, under a special agreement between the depositor and the bank that the former should buy cattle and give the seller's checks payable, or to be presented, after the buyer had sold the cattle and deposited the proceeds in the bank, and that the bank should apply the money so deposited to the payment of such checks exclusively. Held, that the money so deposited could not have been applied by the bank to the payment of said note, and that a surety thereon, who was not a party to said agreement, was not released by the failure of the bank to so apply said deposits: *Wilson v. Dawson*, 52 Ind., 513; S. C., 2 Reporter, 540.

A bank has not a right to retain the balance of a customer's deposit to pay or apply upon an indebtedness of the customer to the bank not yet matured. In an action against a bank, commenced prior to the going into effect of the new code, by the personal representatives of a deceased customer, to recover a deposit which was due and payable to the deceased in his lifetime; held, that the defendant could not, as matter of law, and in the absence of facts entitling it to equitable relief, set off a claim against the deceased, which did not become due until after his death.

A demand, to be set off in such an action, must have been due and payable from the decedent in his lifetime: *Jordan v. National, etc.*, 74 N. Y., 487.

A depositor in a savings bank, who is also a debtor to the bank, as a borrower of its funds, cannot, upon the insolvency of the savings bank, set off the amount of his deposit against his indebtedness. Where, however, a person, indebted to a savings bank as a borrower, deposited an amount less than the debt, intending to use the money so deposited for a payment upon the debt, it was held that the amount

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deposited could be set off against the money, and its losses are their losses, debt. and are to be borne by them equally,

A savings bank is an agent for the depositors, receiving and loaning their money, according to their interest: *Osborn v. Byrne*, 43 Conn., 155.

[9 Chancery Division, 322.]

V.C.B., April 12: C.A., May 22, 29, 1878.

In re WINCHAM SHIPBUILDING, BOILER, AND SALT COMPANY.

POOLE, JACKSON AND WHYTE'S CASE.

Winding-up—Contributory—Companies Act, 1862, s. 164—Fraudulent Preference.

Three directors, who had not paid or been called upon to pay anything on their shares, made themselves liable on their personal guarantee for money advanced to the company by a bank. The company being in difficulties, and the bank having recovered judgment against the guarantors, a resolution was passed by the board of directors that in order to reduce the debt due to the bank the directors be recommended to pay in advance the amount of their shares. The three directors subsequently paid a sum equal to the amount of their shares, which was carried to the credit of the company at the bank. Two days afterwards a petition was presented on which an order for winding up was made:

Held (reversing the decision of Bacon, V.C.), that the three directors were guilty of no breach of trust or duty to the company in paying up their shares in order to relieve themselves of their personal liability to the bank; that the payment was a valid payment on account of the shares; and that the shares must be treated as paid-up shares.

THIS was an application on behalf of the official liquidator of the Wincham Shipbuilding, Boiler, and Salt Company, Limited, to place Messrs. Robert Poole, J. Jackson, and J. G. Whyte, on the list of contributories of the company.

In March, 1876, the company was formed and registered without articles of association for the purpose of acquiring and taking over the works, plant, and business of Mr. Joseph Parks at Wincham in Cheshire.

Messrs. R. Poole, Jackson and Whyte signed the memorandum of *association for fifty £5 shares each, and became directors of the company, but did not pay any deposit on their shares.

On the 1st of May, 1876, at a meeting of the company, R. Poole, as chairman, reported as the result of an interview with the manager, that Parr's Banking Company would not allow any overdraft without the personal guarantee of the directors; and it was resolved that the directors should give their personal guarantee for £5,000 to the bank, and that R. Poole should carry out the arrangement.

The guarantee was given by the directors, including Poole, Jackson, and Whyte, and the money obtained from the

bank was expended in carrying on the business of the company, and no call was made.

The company got into difficulties, and in May, 1877, the bank recovered judgments against the guarantors, including Poole, Jackson, and Whyte.

At a meeting on the 6th of August, 1877, a minute was made that, "In order to reduce the balance due to Parr's Banking Company, it is recommended that the directors do pay up the amount of their shares as authorized by Art. 7 in Table A, and as contemplated in the company's prospectus." At the same meeting it was resolved to close the business of the company, and to advertise for sale the plant, &c., and the company had from that time ceased to carry on business.

No call was made, but on the 4th of September, 1877, Messrs. R. Poole, Jackson and Whyte tendered to Enoch Johnson, the person who had been appointed as *pro tem.* secretary, three several sums of £250 as the amount due on their shares, and asked him to sign a receipt as secretary for these sums as share money. Johnson declined to receive the money or to give a receipt, "as he did not understand why he should be called upon then to give a secretary's receipt for share money at that lapse of time." The £750 was then paid to W. Poole, who was a son of R. Poole, and had, as it appeared, attended the directors' meetings and made the entries in the minute books, and described himself as having "discharged the duties of acting secretary" up to the time when the winding-up petition was filed. The receipt was signed "*pro* secretary, William Poole," and the three sums of £250 each were *paid to Parr's [324 Banking Company, and entered in the pass-book as payments to the credit of the company.

On the 6th of September a petition was presented for winding up the company, and on the 10th of November, 1877, a winding-up order was made.

The question was whether by this payment (which amounted to the full amount due upon their shares) Messrs. R. Poole, Jackson and Whyte had discharged themselves from liability.

The application was heard before Vice-Chancellor Bacon on the 12th of April, 1878.

Sir H. Jackson, Q.C., and H. B. Buckley, for the official liquidator: By the payments made on the 4th of September, 1877, which were received by the bank as payments on account of, and in reduction of, the amounts owing by Messrs. Poole, Jackson, and Whyte, in respect of their per-

sonal guarantee and in part satisfaction of the judgment recovered against them, these directors did not discharge themselves from liability for the amount due on their shares. Being under the double liability of £750 in respect of their shares and £750 in respect of their guarantee to the bank, they have attempted, by paying the sum of £750, to discharge themselves from their liability for £1,500. Having regard to the circumstances—the time when the payment was made, two days before the commencement of the winding-up, when the company was to their knowledge insolvent, and the receipt given by an unauthorized person after the refusal of the regular secretary—the whole thing was a mere contrivance by persons, in a fiduciary position as directors, to gain an advantage to themselves at the expense of creditors of the company; and as such is invalid as a fraudulent preference under the Companies Act, 1862, s. 164: *Habershon's Case* (¹); *Gaslight Improvement Company v. Terrell* (²); *Syke's Case* (³). No doubt, as in the *Gaslight Improvement Company v. Terrell*, these directors have advanced money for the benefit of the company, but they are not entitled on the verge of liquidation to give themselves a preference. They must each pay the £250 due on these 325] shares, and then they will be entitled *to a dividend *pari passu* with the other creditors in respect of the £750 paid on account of the company.

Hemming, Q.C., and Badcock, for Poole, Jackson, and Whyte: There has been no fraudulent preference so as to render this payment invalid under the Companies Act, 1862, s. 164. The debt was due from the company, whose account was at the time overdrawn, to the bank; and to enable the company to pay that debt these directors, in pursuance of the request by the company contained in the minute of the 6th of August, 1877, make this payment to the extent of their own liability. Then how is such payment affected by the authority of William Poole? The company have had the benefit of the payment, and whatever may have been William Pool's formal position, it is admitted that he did the actual work of secretary in the place of Enoch Johnson. In the *Gaslight Improvement Company v. Terrell* (⁴) and *Habershon's Case* (⁵) the directors were themselves creditors of the company and applied the payment in discharge of their own debt, and the test was whether the company was insolvent or not; but in considering the allegation of fraud-

(¹) Law Rep., 5 Eq., 286.

(⁴) Law Rep., 10 Eq., 168.

(²) Law Rep., 10 Eq., 168.

(⁵) Law Rep., 5 Eq., 286.

(³) Law Rep., 13 Eq., 255; 1 Eng. R., 555.

ulent preference, the date of the recommendation or agreement pursuant to which this subsequent payment was made, and not the date of actual payment, must be regarded: *Ex parte Hodgkin* (¹); *Ex parte Kewan* (²). The company was not insolvent, and did not contemplate liquidation on the 6th of August, 1877, but was taking measures to stave it off: *Ex parte Tempest* (³). Even assuming, as regards the other creditors, that there was a fraudulent preference, the money paid can be recovered from the bank, but these directors, having fully discharged themselves from the amount due on their shares, cannot be called upon to pay twice over. Moreover, as directors in the position of trustees, they were entitled and bound to pay debts of the company and to apply the trust moneys for that purpose, and having incurred liability as sureties of the company, they were entitled to indemnify themselves out of the assets: *In re German Mining Company* (⁴).

**Sir H. Jackson*, in reply.

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BACON, V.C.: The difficulty in this case arises from one set of persons having different duties and different interests, their duty as directors and their interest as guarantors being in conflict. It is an undoubted and uncontroverted fact that the company was insolvent. There was no money of the company to pay creditors, and urgent representations had been made by the creditors for payment of these debts, to meet which the company had no means and no banking account on which they could draw. It is established, therefore, that the company was clearly in a condition of insolvency. Under these circumstances a resolution was passed on the 6th of August, 1877, recommending the directors to pay up the amount of their shares, which had never been called up and which they had never offered to pay. No demand was made on the directors, and nothing was done until the 4th of September, when the money was paid at the office of William Poole, who took upon himself to act in the matter without any authority. Then three directors hit upon this plan of paying their own debt to the bank and at the same time discharging the liability on their shares. They bethink themselves of the pretence of paying £750 to the company, but in reality of handing it over to the bank. It was a mere contrivance, and there was no reality or substance in the transaction, except that by means of it £750

(¹) Law Rep., 20 Eq., 746, 754; 15 Eng. R., 593.

(²) Law Rep., 6 Ch., 70.

(³) Law Rep., 9 Ch., 752, 758; 10 Eng. R., 718, 722.

(⁴) 4 D. M. & G., 19.

was paid by them in discharge of their own guarantee. The right of the company to receive £750 was thwarted and frustrated by this act of the directors. It was the duty of the directors to maintain the assets of the company and to distribute them according to law and not to give any one creditor a preference over another; and any contrivance by which, in contemplation of bankruptcy or winding up, the assets were intercepted in favor of one creditor to the exclusion of others, was unlawful and invalid under the Companies Act, 1862, s. 164. What these directors have done was just that invalid or unlawful transaction pointed at by this section. For whose good was this payment made? Not that of the company, but of themselves. *Sykes' Case*⁽¹⁾ [to 327] which his Lordship referred] was very similar. *Here there was a contrivance to create a fund by means of which their guarantee should be discharged; and here, as there, there was a contrivance by which the directors seemed to pay, but did not in fact pay, the amount owing on their shares. It has been contended that these directors were trustees, and had a right to be indemnified in respect of payments made by them on behalf of the company. But this contention has no application to the present case. The money of the directors went to discharge the directors' own debts without any benefit to the company, their *cestuis que trust*, and therefore they owed this £750 to the company in respect of their shares as much as ever they did. The bank, if sued on the ground that this payment was a fraudulent preference, would say in defence that it was not a payment by the company but by the guarantors. These gentlemen must remain liable, as the £750, which ought to have been assets of the company, had been applied for the benefit of these directors and not of the company. Messrs. Poole, Jackson and Whyte must be settled on the list of contributories without crediting them for anything in respect of their payment of £750 to the bank.

From this decision Poole, Jackson & Whyte appealed. The appeal was heard on the 22d of May, 1878.

Hemming, Q.C., and *Badcock*, for the appellants.

Sir H. Jackson, Q.C., and *H. B. Buckley*, for the official liquidator.

The same line of argument was followed as before the Vice-Chancellor. The following cases were referred to by the counsel for the respondent: *Gilbert's Case*⁽²⁾; *Haber-*

⁽¹⁾ Law Rep., 13 Eq., 255; 1 Eng. R., 555.

⁽²⁾ Law Rep., 5 Ch., 559.

shon's Case ('); *Sykes' Case* ('); *Gaslight Improvement Company v. Terrell* (').

JESSEL, M.R.: The Vice-Chancellor has decided that these gentlemen are liable to pay £250 each in respect of a call on their shares, although they allege that they have paid the whole value of their *shares. The real [328 question is, whether the payment actually made by the appellants before the winding-up was a valid payment or not. They were directors of the company, and they had given a personal guarantee for the balance of the company's account with their bankers; and in May, 1877, the bank had brought an action on the guarantee against these three directors, and had recovered judgment in the action. On the 6th of August, 1877, there was a meeting of the directors, at which this resolution was passed: "In order to reduce the balance due to Parr's Banking Company, it is recommended that the directors do pay up the amount of their shares, as authorized by Art. 7 in Table A, and as contemplated by the company's prospectus." There is no question that at this time the company was insolvent. On the 5th of September, 1877, the three directors paid the amounts in question. The secretary had some difficulty in giving a receipt for the money, and W. Poole accordingly gave a receipt without having any right to do so. But the fact is not disputed that the money was paid and received on account of the shares, that it was remitted in due course to the bankers of the company and carried by them to the company's credit, thus reducing the balance against the company and relieving the directors from their guarantee. The Vice-Chancellor decided the question on this ground, that the directors were trustees of all their powers. So, no doubt, they were. But it is further said that they exercised their powers in breach of trust and for their own benefit, and, therefore, that the act which they did was nugatory. But it appears to me that the question is, for whom were they trustees? It does not appear that the Vice-Chancellor considered this point; but it makes all the difference whether they were trustees for the persons who were injured by what had been done in this case, namely, the other creditors of the company. It has always been held that the directors are trustees for the shareholders, that is, for the company. They are the managing partners of the company, and if they abuse their powers, which they hold in trust for the company, to the damage of the company, for their

(1) Law Rep., 5 Eq., 286.

(2) Law Rep., 13 Eq., 255; 1 Eng. R., 555.

(3) Law Rep., 10 Eq., 168.

own benefit, they are liable to make good the breach of trust to their *cestuis que trust* like any other trustees. But directors are not trustees for the creditors of the company. The creditors have certain rights against a company and its 329] *members, but they have no greater rights against the directors than against any other members of the company. They have only those statutory rights against the members which are given them in the winding-up.

That being so, there was nothing to impose a duty on the directors not to pay a debt of the company, for which they were themselves liable, in priority to other debts, unless sect. 164 of the act of 1862 applied, which it certainly does not in the present case. The payment to the bank was not a fraudulent preference; it was made in the ordinary course of business. It was a good payment, and could not be recovered back; therefore the directors, although they derived a collateral advantage to themselves, did not injure their *cestuis que trust*. The payment was not any breach of duty to the only persons for whom they were trustees. The appeal must therefore be allowed with costs.

JAMES and BRAMWELL, L.JJ., concurred.

Solicitors: *R. W. Marsland; Crowder, Anstie & Vizard.*

[9 Chancery Division, 329.]

V.C.B., April 12: C.A., May 29, 1878.

In re WINCHAM SHIPBUILDING, BOILER, and SALT COMPANY.

HALLMARK'S CASE.

Winding-up—Contributory—Director—Entry of Name on Register.

Where no share qualification is necessary, the mere fact of acting as a director of the company, and of attendance at meetings in that character, is not enough to fix a man with knowledge that his name has been entered on the share register, and with consequent liability, if he neither applied for shares nor received any notice of allotment.

There is no presumption of law that a director knows the contents of the books of the company.

The decision of Bacon, V.C., affirmed.

THIS was an application by the official liquidator of the Wincham Shipbuilding, Boiler, and Salt Company, Limited, to settle J. B. Hallmark on the list of contributories of the company for fifty shares.

330] *Hallmark, who was Mayor of Preston, agreed to become a director of the company in March, 1877; and at a meeting of the directors held on the 24th of March, 1876, the

following entry was made: "It being reported to the meeting that Councillor Hallmark (Mayor of Preston) was willing to take shares in the company and to become a director, it was resolved that his name be added to the directorate." Hallmark attended meetings as a director on the 18th and 22d of April, and on the 10th of May, 1876. At this last meeting the minutes of a meeting of the 1st of May (at which Hallmark was not present) were read and confirmed. These minutes stated that, "608 shares having been applied for up to the present," it was resolved "that letters of allotment be at once sent to the parties, and 200 forms of allotment be printed." In making up the number of 608 shares, fifty shares alleged to have been allotted to Hallmark were included. Hallmark's name was entered in the register as the holder of fifty shares; but he swore that he never applied for or authorized any one to apply on his behalf for shares, that he received no notice or letter of allotment, and only discovered the fact from a letter written to him by W. Poole in October, 1877, after presentation of the winding-up petition; and further, that he consented to become director at the solicitation of Robert Poole (the chairman), and acted in that capacity on the distinct representation that no share qualification was necessary, inasmuch as the regulations contained in Table A of the Companies Act, 1862, had been adopted as the company's articles of association. On receiving the letter of the 2d of October, 1877—which was in the following terms: "Knowing that you have never examined or seen the register of shareholders of this company, I consider it my duty to inform you that your name has been wrongfully inserted in such register for fifty shares, and this without any application from you or with your consent or knowledge, I give you this information in consequence of your having frequently stated to me you had no intention of taking any shares in it, and had merely, at the solicitation of the chairman of the company, consented to act as one of the directors. You can now, as a matter of course, give notice to the company to take your name off the register in respect of such shares"—Hallmark sent to the *direc- [33] tors notice that his name had been wrongfully inserted in the register in respect of fifty shares, and required them to strike it out, as he had never signed any application for shares.

The application was heard before Vice-Chancellor Bacon on the 12th of April, 1878.

Sir H. Jackson, Q.C., and *H. B. Buckley*, for the official liquidator: It is not disputed that Hallmark, though he did

not apply for shares and did not receive any letter of allotment, consented to become, and did *de facto* act as, a director of the company. He must therefore be taken to have known that he was liable to have his name placed on the register of shareholders, and also, as director, is bound by notice of the contents of the books of the company in which his name was entered for fifty shares: *Ex parte Brown* (1); *Wheatcroft's Case* (2). Not having taken any steps before the winding-up (though fixed with notice) to get his name removed, he is liable as a contributory for fifty shares.

Hemming, Q.C., and *Badcock*, for Hallmark, were not called on.

BACON, V.C.: Notwithstanding the authority of *Ex parte Brown* (1) and *Wheatcroft's Case*, I do not think the respondent can be placed on the list. The tendency of the more recent decisions is, that in order to impute to a man a contract to take shares, something like a contract must be established. In the face of his statement that he never intended to take any shares, and that he never knew until after the commencement of the winding-up that his name was entered upon the share register, I do not think that his being a director, and attendance at the meetings in that capacity, is enough to fix him with knowledge that his name was entered on the register as the holder of fifty shares. His name will be struck out from the list of contributories, and the liquidator must pay the costs of the summons.

The official liquidator appealed from this decision. The appeal was heard on the 29th of May, 1878.

332] **H. B. Buckley* (*Sir H. Jackson*, Q.C., with him), for the appellant, cited *Ex parte Brown* (1); *Wheatcroft's Case* (2).

Hemming, Q.C., and *Badcock*, for Hallmark, were not called on.

JESSEL, M.R.: This is a case which in some points is exceptional. In most of the reported cases the directors were bound to take a certain number of shares, but here there was no such obligation. Hallmark seems never to have intended to take any shares. He applied for none, no notice of allotment of any was sent to him, and he never knew that any had been allotted to him. Under these circumstances it seems to me a matter of course not to place him on the list of contributories. There was no contract between him and the company to take shares.

The argument of the appellant is, that the court is em-

(1) 19 Beav., 104.

(2) 29 L. T. (N.S.), 324.

(3) 19 Beav., 97.

powered to infer a contract. It is contended that Hallmark, being a director, must be taken to have known the contents of all the books and documents of the company, and so to have known that his name was on the register of shares for fifty shares. But he swears that in fact he did not know that any shares had been allotted to him. Is knowledge to be imputed to him under any rule of law? As a matter of fact, no one can suppose that a director of a company knows everything which is entered in the books, and I see no reason why knowledge should be imputed to him which he does not possess in fact. Why should it be his duty to look into the list of shareholders? I know no case except *Ex parte Brown* which shows that it is the duty of a director to look at the entries in any of the books; and it would be extending the doctrine of constructive notice far beyond that or any other case to impute to this director the knowledge which it is sought to impute to him in this case. I am therefore of opinion that the Vice-Chancellor came to a right conclusion, and the appeal must be dismissed with costs.

JAMES, L.J.: I am of the same opinion. This gentleman swears that he *never applied for shares; he did not [333 know that any had been allotted to him; but on the 1st of May, when he was not present, somebody makes an entry on a piece of paper which contained on it two palpable falsehoods—first, that Hallmark had applied for fifty shares, and, secondly, that fifty shares had been allotted to him. This was done without his knowledge, and cannot be binding on him.

BRAMWELL, L.J.: I am also of the same opinion. I will only add that it seems to me in general extremely objectionable to imply that a man had knowledge of facts contrary to the real truth. This ought only to be done where there is some duty on the part of the man to inform himself of the facts. No such duty existed in the present case.

Solicitors: *R. W. Marsland; Crowder, Anstie & Vizard.*

See 20 Eng. Rep., 755 note.

All the members of a company are chargeable with knowledge of the entries made on their books by their agent in the course of his business, and with the true meaning of the entries as understood by the agent.

Accordingly, in an action against the company, if there be anything obscure in the entries, the plaintiff may prove by the agent what was meant: *Allen v. Colt*, 6 Hill, 818.

Where the plaintiff, who sought to

claim certain bonds issued by a corporation and transactions thereunder were fraudulent, was a stockholder of the corporation which issued the bonds and a mortgage, and all the facts in relation to the execution of the mortgage, the circumstances under which it was made, and the sale of the bonds were shown by the records of the company, he was chargeable with knowledge of them, and must be held cognizant of the frauds committed, if there were any, especially as he declined to

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make any inquiries of the trustees making the sale. Ignorance under such circumstances may well be imputed to him as knowledge: *Kitchen v. St. Louis, etc.*, 69 Mo., 226.

Where debts of an old firm are charged to the new firm on its books, the rule that entries on the books of a firm shall bind the partners, has no application to the liability of the new partner for debts of the old firm so charged, unless he had access to the books and was thereby enabled to know what had been done.

In such case his consent to be bound will be implied if he fail to object at the time when he first has notice of such entries.

The principle that, *prima facie*, a partner is assumed and held to know what is on the books of the firm where he has the means of access to the same, is an inference of fact, always drawn when the circumstances present a case for it, but is not so conclusive that it cannot be rebutted: *Piano Co. v. Bernard*, 2 Lea (Tenn.), 358.

Partnership books, to which each partner has had access, are *prima facie* evidence as between the partners, but the partners cannot, in lieu of the statement required, put in their general book of accounts, consisting often of immense folios, which neither the clerk nor the court can be required to examine. It is the duty of the parties to have them examined by experts, to ascertain what they do show, and to extract from them, in the form of balance-sheets and schedules, such general statements and such specific facts as may tend to elucidate contested matters of charge and discharge: *Myers v. Bennett*, 3 Lea (Tenn.), 185.

The books of a firm kept by a clerk, to which all of the partners have or are entitled to have access at all times, are equally binding on all the partners.

One of the members of a firm kept the time of men employed, in a pass or time book, and reported the time of each man, weekly, to the book-keeper, who entered it on the books of the firm, and when the men were paid, if they claimed more time than had been reported to the book-keeper, the partner keeping the time was called in and the books corrected in accordance with the facts. Sometimes the partner keeping time was sick or absent,

and then the book-keeper got the men's time from other sources. On a settlement of the partnership affairs, the partner who had kept the time of the men claimed that the books of the firm were incorrect, because there was more time shown by them than his time-book showed: Held that, under the circumstances, the books as kept by the clerk were binding on both partners: *O'Brien v. Hanley*, 86 Ill., 278.

Evidence of entries from the books of a corporation are competent to show the amount of stock issued to a stockholder: *Chapman v. Porter*, 69 N. Y., 276.

In stating the accounts of partners, as between themselves, the rule is, that the entries on the partnership books to which both partners have had access at the time when those entries were made, or immediately afterwards, are to be taken as *prima facie* evidence of the correctness of those entries, subject, however, to the right of either party to show a mistake or error in the charge or credit: *Boire v. McGinn*, 8 Oregon, 466.

The pass-book and signature book of a savings bank are admissible, with the testimony of bank officers, as original documents, and *res gestæ* in showing the existence of deposits: *People v. Houst*, 41 Mich., 328.

The plaintiff in error was indicted and convicted of embezzling the funds of a savings bank, of which he was the secretary. Upon the trial, the books of the bank, which were kept by the accused, and in his handwriting, and also a book kept by the treasurer of the bank, showing the amounts paid over to the bank by the accused, were received in evidence:

Held, that as the treasurer's book was kept in the regular course of business of the bank, and as the accused was an officer thereof, it was admissible against the accused to show the amounts received.

The accused offered to show that the other officers of the bank were in complicity with him, and that he made the false entries in the books with their knowledge and approval, for the purpose of deceiving the Bank Department at Albany:

Held that the evidence was properly rejected: *Humphrey v. The People*, 18 Hun, 393.

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In an action brought by a creditor of a corporation against a stockholder to recover the stockholder's proportion of the indebtedness of the corporation, the entries in the books of the corporation

are not admissible in evidence on behalf of the plaintiff to prove the indebtedness of the corporation to him: *Neilson v. Crawford*, 52 Cal., 248.

[9 Chancery Division, 337.]

V.C.H., Nov. 17, 19, 1877. C.A., June 5; July 8, 1878.

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[1875 A. 10.]

Charitable Uses—9 Geo. 2, c. 36—*Debenture Stock*—*Interest in Land*.

Held, by the Court of Appeal, reversing the decision of Hall, V.C., that debenture stock created under the provisions of the Companies Clauses Act, 1863 (26 & 27 Vict. c. 118), Part III, does not give the holder an interest in land within the meaning of 9 Geo. 2, c. 36, and may therefore be given by will for charitable purposes.

And, *semble*, the same rule applies to debentures as to debenture stock.

Ashton v. Lord Langdale (1) and *Chandler v. Howell* (2) overruled.

JOHN BATES, by will dated the 11th of August, 1873, gave to the Corporation of Brighton £9,000 debenture stock of the Midland Railway and £3,000 New £3 per Cents., for certain charitable purposes. He also bequeathed £1,200 Midland debenture stock to the feoffees of Market Harborough for charitable purposes. He also bequeathed £1,000 debenture stock of the Great Northern Railway to the Brighton School Board for charitable purposes.

These debenture stocks were stocks created under the provisions of the Companies Clauses Act, 1863 (26 & 27 Vict. c. 118), Part III.

A decree having been made for the administration of the testator's personal estate, the question came to be decided on the hearing for further consideration before Vice-Chancellor Hall, on the 17th of November, 1877, whether stock of this description could be given by will for charitable purposes.

* *W. Pearson*, Q. C., and *Renshaw*, for the plaintiff, [338
tiff, the executor of the will.

Dickinson, Q. C., and *Bunting*, for the next of kin of the testator.

Eddis, Q. C., *H. Greenwood*, and *Davies*, for the residuary legatee.

Morgan, Q. C., and *Langley*, for the feoffees of Market Harborough: This debenture stock is pure personalty, and can be bequeathed for charitable purposes. It was created

(1) 4 De G. & Sm., 402.
26 ENG. REP.

(2) 4 Ch. D., 651; 20 Eng. R., 815.

and issued under the Companies Clauses Act, 1863 (26 & 27 Vict. c. 118), s. 22, and by sect. 23 it is a charge upon the undertaking, transmissible and transferable in the same manner as other stock of the company, and it has in all other respects the incidents of personal estate. The distinction between this case and *Chandler v. Howell* (*) is that there the security was a mortgage by which an improvement company actually assigned the works, rents, and rates authorized by their act, the assignors were not a trading company; and there was a direct interest in land of which the assignee could possess himself; and *Thornton v. Kempson* (†) was a similar case. Here the security is debenture stock of a joint stock trading company of the same nature as their other shares or stock, only having priority over them; it is merely a charge upon the undertaking; that is, upon the fruit and not upon the tree, and the holder of it cannot possess himself of anything, nor can he stop the undertaking; he is merely entitled to the appointment of a receiver: *Gardner v. London, Chatham and Dover Railway Company* (‡). The authorities show that debentures of this character are not within the Statute of Mortmain: *Myers v. Perigal* (†); *Ashton v. Lord Langdale* (†); *Walker v. Milne* (†). And in the recent case of *Holdsworth v. Davenport* (†), Vice-Chancellor Malins, in deciding that a debenture of a waterworks company which charged the undertaking was not an interest in land within the statute, 339] commented *upon the unreasonableness of the contention, that although shares in a company were admittedly not such an interest, a debenture of the same company, which merely amounted to an assignment of those shares, was such an interest. The case is really stronger with regard to debenture stock.

[They referred to *Wickham v. New Brunswick and Canada Railway Company* (†).]

Millar, for the Corporation of Brighton: There is no analogy between the word "tolls" used in the old mortgages of turnpike tolls, and the same word as applied to the earnings of a railway company. The one was a rate for the use of land, the other is money paid to the company as carriers, and there is no inconsistency in holding that a security which in the one instance gives an interest in land, does not do so in the other. Moreover, the trustees of charities

(1) 4 Ch. D., 651; 20 Eng. R., 815.

(2) Kay, 592.

(3) Law Rep., 2 Ch., 201.

(4) 16 Sim., 533; 2 D. M. & G., 599.

(5) 4 De G. & Sm., 402.

(6) 11 Beav., 507.

(7) 3 Ch. D., 185.

(8) Law Rep., 1 P. C., 64.

are, under the Charitable Funds Investment Act (33 & 34 Vict. c. 34), expressly empowered to invest their moneys on real securities, without being deemed thereby to have acquired land within the Statute of Mortmain; and there is great inconsistency in the contention that they cannot hold debenture stock without infringing that statute.

HALL, V.C.: I have considered this case since Saturday, and I have looked again into the authorities which I examined not long ago in the case of *Chandler v. Howell* (¹), and it appears to me that I really cannot distinguish the present case from those cases on which I then founded my judgment. This debenture stock is stock, the nature of which is regulated by the Companies Clauses Act, 1863. I have considered all the sections in Part III, of this act. The 22d section provides for the creation and issue of debenture stock, and it describes it as "stock"; it is to be raised on mortgage or bond. [His Lordship read the section down to the words "have power to raise on mortgage or bond."] This, then, is a creation by bond or mortgage of stock to be called debenture stock, and that stock by the 23d section is described thus: [His Lordship read the 23d section.] That does not appear to me to do more *than provide for [340 the transmissibility of the stock, that is to say, it is to go like ordinary shares and stock of the company, to the legal personal representative, and in all other respects it is to have the incidents of personal estate. But that does not touch the question which has to be determined in this case, namely, whether it is to be taken as pure personal estate by reason of the circumstance that ordinary shares and stocks have been held and considered to be in the nature of pure personal estate. I do not think this act goes far enough to effectuate that. The words upon a fair construction do not amount to that. The holders of debenture stock, by the 31st section, are not to rank as being holders of stock, that is, of ordinary stock, but are to be considered as entitled to the rights and powers of mortgagees of the undertaking other than the right to require payment of the principal money paid up in respect of the debenture stock. The 24th section does not appear to me to assist the determination of the present case. The 25th section provides for the appointment of a receiver when the interest has been in arrear for a certain time; and by the 26th section that receiver is to be a receiver of the whole, or a competent part of the tolls or sums liable to the payment of the interest. So the position of a holder of debenture stock is this. He is a person who

(¹) 4 Ch. D., 651; 20 Eng. R., 815.

may obtain a receiver of tolls or sums liable to the payment of his interest, and these tolls or sums become liable by reason of the charge upon the undertaking which is given by sect. 23. That charge carries with it the right to have a receiver of certain tolls or sums; that is to say, in so many words, the revenue arising from the undertaking. That being the effect of this act of Parliament, with respect to the cases which were referred to in my judgment in *Chandler v. Howell* (*), I do not propose to go into those cases again, because I do not believe it will be said or considered that in the course of my examination of them I did not correctly and sufficiently refer to the particulars of the several cases. I may observe that in *Walker v. Milne* (*) the judgment of Lord Langdale no doubt went the other way, but in *Ashton v. Lord Langdale* (*), Vice-Chancellor Knight Bruce respectfully declined to follow that case. I need not refer to [341] any other authorities upon *the case generally, but I will merely call attention to one modern case, that of *Alexander v. Brame* (*). That was a mortgage in which the late Master of the Rolls held that debentures of the commissioners of a dock made under an act of Parliament, and in the form of an assignment of the duties arising by virtue of the act, were within the Mortmain Act, following the case of *Ashton v. Lord Langdale* (*). There was not there an assignment of anything but what might be properly described as the fruits of the concern. It is said that there is a distinction between a charge upon the fruits and upon the corpus, and that was the real argument before me. The cases have been divided into two classes, one in which the thing itself producing the fruit was affected to be charged, and the other in which only the fruit of the thing was the subject of charge, in which latter case it was contended that such was not an interest in land within the act. It seems to me that such a distinction is unsound both in reason and in principle. If you charge the fruit you charge the rents and profits. Although you may say you will not charge, and although you may be prohibited from selling the land, still you are getting within the mischief of the Mortmain Act. You are still getting an interest in land which the act does not intend you to get. For although it is true that the 1st section does not in so many words include all interests in land, yet the 3d section does, and it has always been considered that in construing sect. 1, you must have regard to the provisions of sect. 3. There is a case before Sir William

(*) 4 Ch. D., 651; 20 Eng. R., 815.

(*) 4 De G. & Sm., 402.

(*) 11 Beav., 507.

(*) 30 Beav., 153.

Grant, where he observed that he could not make out any solid distinction between the case before him and the earlier cases bearing upon the construction of those two sections; in like manner it appears to me that there is no solid distinction between the present case and the cases to which I have referred. Mr. Millar contended that, in fact, a railway company is more in the nature of a carrying company, and therefore ought not to be considered as a company whose property is land. Many of the cases which have arisen have had that element of property being mixed in its nature; but it has always been said that they cannot be distinguished on that ground so long as they are within the mischief of the act. That was Sir William Grant's language in the case of **Finch v. Squire* ('). In the case of *Gardner v. [342 London, Chatham and Dover Railway Company* ('), the observations on the meaning of the word "undertaking" and the decision itself were upon an entirely different question, and not at all upon the constructing of the Mortmain Act, and I cannot, therefore, consider that case to be an authority, displacing the decisions which were referred to by me in *Chandler v. Howell* ('), and in particular the case before Vice-Chancellor Knight Bruce, of *Ashton v. Lord Langdale* ('), which is on all-fours with the present case. I must, therefore, again follow the cases referred to, and having considered the present case in all its bearings, I am of opinion that the debenture stocks in question are an interest in land within the Mortmain Act, and these bequests consequently void.

The Corporation of Brighton appealed. The appeal was heard on the 5th of June, 1878.

Southgate, Q.C., and *Millar*, for the appellants: Ordinary shares in a waterworks company are not an interest in land within the Mortmain Act: *Bligh v. Brent* ('); nor shares in a railway company: *Druncuft v. Albrecht* ('); *Bradley v. Holdsworth* ('); *Taylor v. Linley* ('); nor shares in a land company: *Entwistle v. Davis* ('). Debentures were created by the Companies Clauses Act, 8 Vict. c. 16, and in form they purport to assign the "undertaking." It was decided in *Doe v. St Helens Railway Company* (') that a debenture holder could not maintain ejectment; and it is shown by *Gardner v. London, Chatham and Dover Rail-*

(') 10 Ves., 41.

(') Law Rep., 2 Ch., 201.

(') 4 Ch. D., 651; 20 Eng. R., 815.

(') 4 De G. & Sm., 402.

(') 2 Y. & C. Ex., 268.

(') 12 Sim., 189.

(') 3 M. & W., 422.

(') 2 D. F. & J., 84.

(') Law Rep., 4 Eq., 272.

(') 2 Q. B., 364.

way Company that a debenture holder has in fact only a charge on the net profits of the undertaking. It was accordingly held in *In re Mitchell's Estate* (*) that a debenture was pure personalty within the Mortmain Act. Debenture stock was created by 26 & 27 Vict. c. 118; and looking at the cases as to debentures, it is clear that the interest of a holder of 343] debenture *stock is no more an interest in land than that of an ordinary shareholder; he merely has a preferential right to the profits. *Cluff v. Cluff* (*) is against us, but *Holdsworth v. Davenport* (*) and *In re Mitchell's Estate* (*), as to debentures, are in our favor. *Chandler v. Howell* (*) might well stand with a reversal of the present decision.

Dickinson, Q.C., and Bunting, Eddis, Q.C., H. Greenwood, and Davies, contra: There has been a confusion made in some of the cases between the interests of the shareholders and the interest of the company. *Holdsworth v. Davenport* is an instance of this, for the Vice-Chancellor assimilates a debenture to a mortgage of shares, to which it has no resemblance. A mortgage of turnpike tolls has been held within the Mortmain Act: *Knapp v. Williams* (*). Sect. 3 of the act refers to charges and incumbrances affecting land. Now under 26 & 27 Vict. c. 118, s. 31, the holders of debenture stock have the rights and powers of mortgagees of the undertaking other than the right to require repayment of the principal money. Their position is precisely similar to that of mortgagees of tolls, they can exercise rights over land by virtue of their security.

[JAMES, L.J.: If a testator charges his real estate with his debts, is each of the debts an interest in land?]

Probably not; but a legacy charged on land is an interest in land within the Mortmain Act: *Brook v. Bradley* (*). In *Finch v. Squire* (*) a security on poor rates and county rates was held to be within the act. *Thornton v. Kempson* (*) is similar. In *Myers v. Perigal* (*) shares in a joint stock bank holding land were held not to be within the act; and the same was held in *Ashton v. Lord Langdale* (*), but in the same case mortgages of the undertakings and the tolls were held to be within the act; and in *In re Langham's Trust* (**) the same distinction was taken. *Edwards* 344] *v. *Hall* (**) only applies to shares, and *Walker v.*

(*) 6 Ch. D., 655; 23 Eng. R., 258.

(*) 2 Ch. D., 222.

(*) 3 Ch. D., 185.

(*) 4 Ch. D., 651; 20 Eng. R., 815.

(*) 4 Ves., 430, n.

(*) Law Rep., 3 Ch., 672.

(*) 10 Ves., 41.

(*) Kay, 592.

(*) 16 Sim., 538; 2 D. M. & G., 599.

(*) 4 De G. & Sm., 402.

(*) 10 Hare, 446.

(*) 6 D. M. & G., 74.

Milne (') is directly overruled by *Ashton v. Lord Langdale* (*). The language of *Gardner v. London, Chatham and Dover Railway Company* ('), which is explained by *Bowen v. Brecon Railway Company* ('), if examined shows that Lord Langdale went too far in saying that a security on the property of a continuing business was not a charge on land.

Southgate, in reply : There is no authority that a security which only gives a right to a share of the profits of a partnership is within the act. Debenture stock is nothing but a perpetual annuity payable out of the profits.

July 3. JAMES, L.J., now delivered the judgment of the Court (Jessel, M.R., and James, Baggallay, and Bramwell, L.J.J.):

This is an appeal from the Vice-Chancellor Hall's decision that debenture stock of the Midland Railway Company is subject to the prohibitions of the statute of Geo. 2 restraining gifts of land to charitable uses. This decision is in direct conflict with a recent decision of the Vice-Chancellor Malins in *Holdsworth v. Davenport* (*). And assuming the case of debenture stock to be the same for this purpose with the debentures formerly given by railway companies and other public bodies (which will require to be considered), there are two conflicting decisions, one by Lord Langdale holding that they were not, and one by the Vice-Chancellor Knight Bruce holding that they were, within the prohibition. Having to deal with this conflict of authority, it is well to refer to the act itself and a little to the history of the decisions upon it.

The act recites as follows: "Whereas gifts or alienations of lands, tenements, or hereditaments in mortmain are prohibited or restrained by Magna Charta and divers other wholesome laws as prejudicial to and against the common utility, nevertheless this *public mischief has of late [345 greatly increased by many large and improvident alienations or dispositions made by languishing or dying persons or by other persons to uses called charitable uses to take place after their deaths to the disherison of their lawful heirs."

It had from the earliest times been the policy of the common law as interpreted by the judges to discourage the inalienability of land, and this altogether irrespective of the

(') 11 Beav., 507.

(*) 4 De G. & Sm., 402.

(*) Law Rep., 2 Ch., 201.

(*) Law Rep., 3 Eq., 541.

(*) 3 Ch. D., 185.

peculiar mischiefs supposed to arise from the vesting of lands in mortmain, which deprived the sovereign and the lords of the profitable incidents of feudal tenures. And this policy in more modern times approved itself to the Legislature. It was deemed in itself a mischief that lands should be rendered inalienable, and the Legislature found that this mischief was being mischievously increased in one particular way—that is to say, it was found that dying persons were, sometimes from spontaneous weakness, and sometimes from their readiness to yield to the many influences which can be brought to bear on persons *in extremis*, too easily minded to give lands to charitable uses (words of the widest signification), and to be posthumously benevolent at the expense of their lawful heirs. And this was the mischief, and the sole mischief, which the Legislature set itself to prevent, viz., to prevent the increase of inalienable land through the weakness of or practices upon dying persons, or through posthumous charity. And upon examination of the enactments it will be found that the act is in entire consistency with the recital. In the act there is no prohibition of gifts of land by deeds *inter vivos*, but there are regulations securing that such gifts shall not be in substance posthumous merely by avoiding the form. There is no prohibition of any amount of testamentary charity confined to pure personal property. But the act does in the most comprehensive terms forbid any such testamentary or posthumous charity as to any interest in land or other real estate, or as to any charge or incumbrance affecting the same. At first sight it may seem that the enactment has gone far beyond the scope of the recited object, for it extends, as has always been held, even to a pecuniary legacy, so far as it is payable out of land or any charge or incumbrance on land. But it will be found on examination that all the comprehensive words in the prohibitory enactment 346] were in truth necessary or useful to prevent evasions and devices contrary to the main intent of the act, although from the impossibility of legislating for every particular case they have been found to apply in a great many cases to gifts which were neither in effect or intention contrary to the real object of the Legislature. No interest in land can be given, because under color of a gift of a mere pecuniary interest the land itself could easily be given. Let a perpetual annuity of £100 a year be given out of lands worth £50, the heir of course would let the annuitant take the lands themselves. A charge or incumbrance of £10,000 on lands worth £5,000 would be an easy practical mode of

giving the lands themselves. And take the strongest case of apparently a mere legacy of a sum of money out of personal estate. A testator whose whole assets were worth only £5,000 gives a legacy of £10,000 to charitable uses, and makes some official or other person interested in the charity his executor and residuary legatee. The result would be that the charity would get the assets in specie, which might include long terms of years in land and mortgages, and which by foreclosure or long possession would become the land itself. There is nothing really in the act which has so far gone, or at all gone, beyond its recited object as to preclude the application of the rule of construction, the rule of common sense, that you are to construe the enacting part by the light of the recital of its object. Accordingly, it has been held that a share or interest in a trading partnership or business, incorporated or unincorporated, is not within the prohibition, although it may have, as indeed almost every business has, some interest in land with which or on which it is carried on, or although it may have amongst its assets any amount of mortgages, charges, or incumbrances on land. And shares in railways, shares in other public companies of a like nature, are now universally admitted not to be obnoxious to the prohibition of the act. It was never supposed that a bond debt or other specialty binding the heir was within the act, although its very object was to affect the real estate of the obligor. The personal estate of a testator is not for this purpose affected by the fact that an item in it is a share in the unascertained and unadministered assets, real and personal, of another testator.

Now how, dealing with the matter on principle, does the case *of a railway debenture stand? Previously to [347 the cases about to be mentioned, it was very difficult to say that it was not a charge or incumbrance on land within the words of the statute. There are in this country a great many railways which are private and individual property. All, or almost all, the Canal Acts, passed about the end of the last century and the beginning of this, contained powers enabling the proprietors of any mine or work within a certain distance of the canal to make a railway or tramway communication with the canal, the same to be open to the public on the payment of the same tolls as were taken by the canal itself. Now, it is clear that a mortgage or a debenture, in the very words of the ordinary railway debenture given by the owner of such a railway would, in fact, be precisely similar to a mortgage on land. The mortgagee could, by himself, or at all events by a receiver, get into the

actual possession of the line of railway, and, if the incumbrance were too heavy to be redeemed, that possession would be perpetual. The Vice-Chancellor Knight Bruce, who was, as I happen to know, very familiar with that class of railway property to which I have referred, evidently, in *Ashton v. Lord Langdale* (*), considered that the debenture given by the corporate body of its undertaking and tolls was, in legal effect and operation, the same as a similar charge on a private owner's railway would be, and on that assumption it was impossible for him to arrive at any other conclusion than the one he did. On the other hand, Lord Langdale must have thought that there was something essentially different between the charge created by a private owner of a railway and a charge made under statutory authority by a parliamentary body established and empowered to make, maintain, and manage for public convenience a great public highway, the maintenance and working of which may be of vital importance to the state itself; and he held, accordingly, in *Walker v. Milne* (*), that the holder of a railway debenture issued by such a body did not acquire a charge on land, any more than a shareholder in the company acquired an interest in the land. The nature of such a debenture came under the consideration of the Court of Queen's Bench in *Doe v. St Helens Railway Company* (*), and of the Court of Exchequer in *Hart v. Eastern Union Railway* 348] **Company* (*), by which it was established that the debenture, wide as its words were, did not pass the soil and did not pass the rolling stock of the company. And, on the same principle, it was held in *Gardner v. London, Chatham and Dover Railway Company* (*), that a debenture holder could not take or touch the soil of the lands required and used for the actual working of the railway, nor the soil of any surplus lands which had been acquired, but were not required for actual use, nor the rolling stock; nor could he, by himself or his receiver, get the management of the line, nor do anything in derogation of the authority of the statutory managers, who could not delegate to any one else their powers, nor shift their responsibility. The words of the security were subordinated to the essential nature of the undertaking, and limited so as not to extend to the very destruction of the thing the maintenance of which in perpetuity was the intent and object of the Legislature; and the result of that case was that the receiver, whose appointment

(*) 4 De G. & Sm., 402.

(*) 11 Beav., 507.

(*) 2 Q. B., 364.

(*) 7 Ex., 246.

(*) Law Rep., 2 Ch., 201.

the debenture holders were entitled to have made, was in truth nothing but a cashier or treasurer imposed on the company. He could not appoint or discharge a ticket-taker or a railway porter or an engine-driver or plate-layer. Every servant of the railway would still be under the directors, and their wages and salaries fixed by them. All purchases and contracts for the use of the railway would be made by them. The receiver, as treasurer, would take all the moneys received by every officer of the company, would thereout pay all outgoings on the warrant of the directors, the statutory managers of the concern, and would then apply the net surplus, being the net earnings of the business, in discharge of his immediate principals, the debenture holders. His functions would be, except as to the net surplus, neither more nor less than those of a banker appointed to receive all the moneys of a large brewery, and to pay all checks of the persons properly authorized to draw on the account. Now, with the light thrown by these cases on the real legal operation and effect of a railway debenture, it is impossible not to prefer the decision of Lord Langdale in *Walker v. Milne* (*) to the decision of Vice-Chancellor Knight Bruce in *Ashton v. Lord Langdale* (*). *But the case before us is really [349 not that of a debenture, but of debenture stock. It seems to be called debenture stock, *lucus a non lucendo*, because it is anything but a debenture. There is no debt, except, indeed, as to the annual interest; the capital cannot be called in, and cannot be paid off. It is a right to a perpetual annuity, payable out of the concern. There is no conveyance or assignment of anything to the stockholder, or to any trustee for him. There is an entry in the books of the concern that there is so much debenture stock, on which there is so much to be paid half-yearly to the holders, just like the entry of the national debt in the great books at the Bank of England. And the whole of the rights of a stockholder depend on the act of Parliament authorizing railways and other bodies to create such a stock. The 22d section of the Companies Clauses Act, 1863 (26 & 27 Vict. c. 118), so far as is material, is as follows: The company may, from time to time, raise money by the creation and issue, at such times, on such terms, subject to such conditions, and with such rights and privileges as the company thinks fit, of stock, and may attach to the stock so created such fixed and perpetual preferential interest as it may think fit, not exceeding the prescribed limit. By the 23d section it is directed that the debenture stock, with the interest

(*) 11 Beav., 507.

(*) 4 De G. & Sm., 402.

thereon, shall be a charge on the undertaking prior to all shares and stock of the company, and shall be transmissible and transferable like other stock of the company, and shall in all other respects have the incidents of personal estate. By the 24th section, it is provided that the interest on debenture stock shall have priority of payment over all dividends or interest on any shares or stock of the company, ordinary, preference, or guaranteed. So far it is quite clear that the stock is of the same nature as other stock of the company, only with the important difference that it ranks in payment over all other stock, and that all arrears must be paid before a farthing is to reach the proprietors of the other stock. It is nothing but preference stock with a special preference. There is nothing to give to the stockholders any right, either at law or in equity, under any circumstances, to take possession of a single item of the property of the company in specie, whether real or chattel.

Now, is any difference made in this respect by the provisions as to the appointment of a receiver? The receiver, when 350] appointed, *is to receive the whole or a competent part of the tolls or sums liable to the payment of the interest, and, after payment of interest on the mortgages and bonds of the company, to distribute the money ratably amongst the proprietors of debenture stock. In England the receiver is to be appointed by two justices of the peace, on the application of a prescribed proportion of stock proprietors. It is difficult to conceive how this could, directly or indirectly, tend to make any land inalienable or to give to the stockholder, either immediately or as the ultimate result of any amount of insolvency, the possession or the right to the possession of any portion of the property of the company, which must remain legally and equitably in the possession of the company and under the absolute control and dominion of the statutory body of managers. The expression, no doubt, is "tolls or sums," but it is tolls or sums liable to the payment of the interest. It is possible to conceive the case of a company, the owner of a market, a port, or other franchise, with nothing to do but to receive tolls and pay its creditors, just as in the case of a turnpike or bridge the whole tolls may be taken by the creditors, leaving the road or bridge to be repaired by the parish or county. But with a railway company this is impossible. The actual tolls taken, whether from other carriers or from freighters, or passengers, must, from the very nature of the case, remain under the dominion of the directors, to enable them to do what is required for the preservation of the road

and the safety of life and property. The only thing really chargeable is the net earnings of the company, the same fund out of which, if sufficient, the dividends and interest of the other stockholders are to be paid. Again, there is by the act a special machinery for the summary appointment of a receiver; but, without that special machinery, a person having a charge on the net earnings of such a body could have got a receiver of those net earnings, if the managing body were to disregard its duty of applying them exclusively to the payment of the debenture stock interest. I apprehend that, even with regard to preference shares properly so called, if the directors, acting in the interest of a majority of ordinary shareholders, were to misapply or not to apply such net earnings, the court would have no difficulty in appointing a receiver to receive and properly apply the same.

By the 31st section it is, no doubt, provided that, in all respects *not otherwise by or under the act or the [351] special act provided for, debenture stock shall be considered as entitling the holders to the rights and powers of mortgagees of the undertaking, other than the right to require the repayment of the principal money. But what are the rights and powers of mortgagees of the undertaking consistent with the powers conferred by the special act on the railway directors? They are not powers to take the land or enter on the land, or in any way to interfere with the ownership, possession, or dominion of the statutory owners and manages.

The result is that the debenture stock is a charge on the net profits and earnings of a trading corporation, and is no more land, tenement, or hereditament, or any interest in land, tenement, or hereditament, or charge or incumbrance affecting land, tenement, or hereditament, than the share stock in such corporation is, or a bond or other debt due from a man who has got real property is.

Solicitors: *Clarke & Calkin; Singleton & Tattershall; Tilleard, Godden & Holme.*

[9 Chancery Division, 351.]

M.R., June 29 : C.A., July 3, 1878.

VAVASSEUR V. KRUPP.

[1877 V. 50.]

Foreign Sovereign—Jurisdiction—Submission—Injunction—Property—Patent.

The court has no jurisdiction to prevent a foreign sovereign from removing his property in this country.

A foreign sovereign who, for the purpose of obtaining his property, submits to be made a defendant in an action, does not thereby lose his rights.

There is a right of property in an article made in infringement of a patent although the court would order the article to be destroyed.

A foreign sovereign bought in Germany shells made there, but said to be infringements of an English patent. They were brought to this country in order to be put on board a ship of war belonging to the foreign sovereign, and the patentee obtained an injunction against the agents of the foreign sovereign and the persons in whose custody the shells were, restraining them from removing the shells. The foreign sovereign then applied to be and was made a defendant to the suit. An order was then made by the Master of the Rolls, and affirmed on appeal, that notwithstanding the injunction he should be at liberty to remove the shells.

JOSIAH VAVASSEUR, the plaintiff in this case, had brought an action against F. Krupp, of Essen, in Germany, [Alfred 352] Longsdon, *his agent in England, and Ahrens & Co., described as agents for the Government of Japan, claiming an injunction and damages for the infringement of the plaintiff's patent for making shells and other projectiles. The shells in question had been made at Essen, in Germany, had been there bought for the Government of Japan, had been brought to this country and landed here in order to be put on board three ships of war which were being built here for the Government of Japan, and to be used as ammunition for the guns of those ships.

On the 18th of January, 1878, an injunction was, without prejudice to any question, granted, restraining the defendants and the owners of the wharf where the shells lay from selling or delivering the shells to the Government of Japan, or to any person on their behalf, or otherwise from parting with, selling, or disposing of the shells and projectiles.

On the 11th of May an application to the court was made on behalf of the Mikado of Japan and his Envoy Extraordinary in this country, that, notwithstanding the injunction, the Mikado and his agents might be at liberty to remove the shells, and that if and so far as might be necessary the Mikado and his Envoy should for the purposes of making and being heard upon such application be added as defendants in the suit. Upon this application an order was made by the Master of the Rolls that on the Mikado by his counsel

submitting to the jurisdiction of this court and desiring to be made a defendant, and on payment into court by the Mikado of £100 as security for costs, the name of the Mikado be added as a party defendant in the action.

Notice of motion was then given on the part of the Mikado that the injunction might be dissolved, and that the Mikado might be at liberty to take possession, and remove out of the jurisdiction of the court the shells in question the property of his Imperial Majesty.

The motion was heard before the Master of the Rolls on the 29th of June.

Aston, Q.C., Daney, Q.C., and Eberitt, for the plaintiff.

Fooks, Q.C., and Cozens-Hardy, for the Mikado.

**Chitty, Q.C., Cookson, Q.C., Macrory, and Medd, [353 for the defendants.*

JESSEL, M.R.: The plaintiff, entertaining not unnaturally the strongest objection to Mr. Krupp manufacturing these shells without paying any royalty, has undertaken to prevent persons in this country from making any use of or removing these shells.

Then the Mikado came in and said, "I am a foreign sovereign, yet I will submit to the jurisdiction for the purpose of empowering the court to make an order; but I say that you cannot interfere with my taking away these shells under these circumstances brought to this country." I think that he is right; and then comes the question what the form of the order should be. Now the defendants say, and I think they say rightly, the order did not prevent the Mikado from taking the shells away; but when the Mikado's agent applies for them, the persons liable under the injunction say they do not wish to run any risk, because if it was afterwards decided that allowing the Mikado to take the shells was a breach of the injunction, they might be exposed to loss. They therefore would not allow the Mikado to take the shells away without obtaining the decision of the court; and the object of this motion is to obtain that decision, and nothing else. I propose to make an order that, without prejudice to any question, notwithstanding the injunction, the Mikado shall be at liberty to take out of the jurisdiction the shells which belong to him.

The plaintiff expressed his intention at once to appeal, and the appeal came on at once for hearing, on the 3d of July, without any order having been drawn up or any formal notice of appeal having been given.

Aston, Q.C., Davey, Q.C., and Eberitt, for the plaintiff:

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These shells may be the property of a foreign sovereign, but they are now in this country, and he has submitted to the jurisdiction of the court, and must defend the action and take the consequences like any one else. If a foreign sovereign allows his property to come here and his agents here 354] give rights over it to *third parties, the court must deal with the property as if it was ordinary property: *Gladstone v. Musurus Bey* (*). In the other cases, such as *Hullett v. King of Spain* (*), the sovereign had not submitted to the jurisdiction. But there is no property in these shells, for if an article made in infringement of a patent is brought into this country, the court will order it to be destroyed.

There is a difference between what is done by a sovereign and what is done by his agents: *Dixon v. London Small Arms Company* (*). No doubt a foreign sovereign cannot be sued, but where his property is within the jurisdiction there is no reason why the court should refrain from adjudicating upon it. If the court has no jurisdiction, why is this application made?

[*Fooks*, Q.C.: The defendants have had this injunction served on them, and are anxious not to do anything which might be held wrong.]

Fooks, Q.C., and *Cozens-Hardy*, for the Mikado, were not called upon.

Chitty, Q.C., *Cookson*, Q.C., *Macrory*, and *Medd*, appeared for the defendants.

JAMES, L.J.: I am of opinion that this attempt on the part of the plaintiff to interfere with the right of a foreign sovereign to deal with his public property is one of the boldest I have ever heard of as made in any court in this country.

It is an undoubted and admitted fact that the Mikado of Japan, who is a sovereign prince, bought in Germany a certain quantity of shells, which shells were lawfully made in Germany, although they were, as alleged, made upon the same principle as something which is the subject of a patent in this country. Those shells were bought by the Mikado for the purpose of his government. He brought them into this country on the way to Japan, and he asks to be allowed to remove them from this country, that is to say, he asks that he shall not, by reason of something which was 355] *done between the plaintiff and some other persons, be interfered with in his removal of them to his own country. It seems to me that to refuse him that leave would be a very

(*) 1 H. & M., 495.

(*) 2 Bli. (N.S.), 31.

(*) Law Rep., 10 Q. B., 130; 11 Eng. R., 198.

dangerous proceeding. If a tribunal of any foreign country were to deal with the ammunition of a British man of war under those circumstances, or refuse to permit the captain of a British man of war to remove his ammunition and shells, or anything else, I think that our country would consider it a very serious matter, and possibly demand reparation.

The objection made is this. The plaintiff says, "True it is that these shells were your property; you had brought them to this country *in transitu* to Japan, and you had no doubt a right so to bring them. But some persons in this country, either with or without your authority—with your authority it may be, but at all events having possession of these things as your agents—were minded to make, and did make, a use of these shells which was inconsistent with our patent, that is to say, they were making a profitable use of them." If they were doing so, then they are liable in an action for damages, and the plaintiff may recover any damages that he may be entitled to. But that does not interfere with the rights of the sovereign of Japan, who now asks to be allowed to take his property. It was his property. It is now in the shape in which it was when he lawfully bought it in Germany, where it was lawfully made, and he asks to be allowed to take it out of this country in that shape.

I cannot conceive it possible how any doubt could arise or could be suggested as to the right of the Mikado to do this. I suppose that there is a notion that in some way these shells became tainted or affected through the breach or attempted breach of the patent; but even then a foreign sovereign cannot be deprived of his property because it has become tainted by the infringement of somebody's patent. He says, "It is my public property, and I ask you for it." That seems to me to be the whole of the case.

It is, however, said that the Mikado has submitted to the jurisdiction. No doubt he submitted to the jurisdiction, but in this way only, and for this purpose only. In certain circumstances (which it is not necessary for us now to inquire into) Mr. Ahrens and others were ordered by a court of municipal jurisdiction not to *deliver certain shells [356 and other things to the Mikado, that is to say, treating them as property, these persons were ordered not to deliver them to the Mikado, but entirely without prejudice. It could never be supposed that that order was to deprive him of any right or property which he had in them. Then when he himself applied to these persons and said, "Give me my property, let me take my property out of this country to

my own country," they said, "We do not claim the property, we know it is yours, but there is an injunction of this court, and we may be liable to punishment by this court if we give you up your property." Upon which the Mikado, for the purpose of making an application to relieve his own property from a fetter which had been put upon it (I think inadvertently, if I may venture to say so), by the injunction of the court, does come and say, "I will submit to the jurisdiction of the court," which means "I will submit to the jurisdiction of the court as to discovery, as to process, and as to costs." He never meant "I shall submit my public property to be dealt with by a court of municipal jurisdiction in another country, and in violation of my rights." The whole effect of that proceeding was that he made himself a suitor liable to the ordinary consequences, so far as they can be enforced against a sovereign as to costs and otherwise, and in that character he made a deposit of £100 to provide for the costs of the proceedings. The order he obtained does not prevent his saying, as is the truth, "This is my property, it was lawfully bought by me and paid for by me, and it is public property. Whether anybody else has done anything right or wrong with it, is a question with which I have nothing to do. No court of municipal jurisdiction has any right to interfere with my property, and be good enough to remove your hands from it." The Master of the Rolls, who granted the injunction, and heard the whole matter, as soon as he learnt what was the state of things, said of course that he could not keep hands on a property which he had no right to interfere with; and he made the order which is complained of.

BRETT, L.J.: It does not seem to me that in this case there is any fact whatever in dispute. These shells were 357] made by Krupp at Essen. *That was no infringement of the plaintiff's patent. In Germany they were sold to the Mikado and paid for by the agents of the Mikado. None of these facts are in dispute; and this purchase and sale was a perfectly lawful purchase and sale. The Mikado had three ships of war building in this country, and he desired that these shells should be sent to this country and put on board these ships. They were sent to this country by the order and by the authority of the Mikado, through Ahrens & Co. They were brought into this country, and they were deposited on a wharf. The plaintiff then finding these shells in this country, and finding, as he alleges, that they were made according to the process of his patent, asserts that the bringing them into this country by Ahrens &

Co. is an infringement of his patent by them ; and thereupon he brings an action against Ahrens & Co. for the infringement. In that action he claims an injunction against Ahrens & Co., and it may be that he claims an order from the court to destroy those shells, because he says they are an infringement of his patent. In the course of that suit an injunction is obtained against Ahrens & Co. and against others, which injunction in terms forbids them from delivering these shells, which with other things are in their possession, to the ships of the Mikado, and in fact forbids them from sending the shells to Japan. To this action the Mikado was no party, but he or his agents here come forward and claim to have the delivery and the possession of these shells. The defendants in the action are not unwilling to give the shells to the Mikado, but they say, "If we do so, it may be said that we have broken the injunction, and we may therefore be liable to certain penalties." It seems to me beyond dispute that this was the purpose for which the Mikado came in and desired to be made a party to the suit, and the Master of the Rolls thus describes the purpose. [His Lordship then read the judgment of the Master of the Rolls.] Now it is said that in the first place there is a dispute whether these shells are the property of the Mikado. It is argued that if he were a private individual, then, although he has purchased these shells and paid for them, yet, inasmuch as there has been an infringement of the patent, the property is not in him, because the court may order the shells to be destroyed. Is that argument good or not? To my mind it is utterly fallacious. The *patent law has nothing [358 to do with the property. The facts here are undisputed, that Krupp made them with his own materials in Germany, where he had a right to make them, that he entered into a contract to sell specific shells to the Mikado, that that contract was performed, and that the shells were paid for, and that they were delivered in Germany to the Mikado's agent. Well, unless the patent law prevents the property from passing, nobody can doubt that the property passed to the Mikado. Therefore the dispute is not upon facts, but upon a false theory of law, that the patent law prevented the property from passing. I am clearly of opinion that the patent law did not prevent the property from passing. The goods were the property of the Mikado. They were his property as a sovereign ; they were the property of his country ; and therefore he is in the position of a foreign sovereign having property here.

Whether the fact of Ahrens & Co. bringing these goods

into England under these circumstances, and with this intention, was an infringement of the patent, I decline to consider. I shall assume for this purpose that it was an infringement, and that we have in this country property of the Mikado which infringes the patent. If it is an infringement of the patent by the Mikado, you cannot sue him for that infringement. If it is an infringement by the agents, you may sue the agents for that infringement, but then it is the agents whom you sue. The injunction is against the agents, the Mikado being then no party to the action, and not being forbidden to do anything. He then comes here as a sovereign, and requires the delivery of his own goods. His only difficulty is the injunction against the agents, and for the purpose of enabling the court to make an order, he what is called "submits himself to the jurisdiction of the court." I think the interpretation put by the Master of the Rolls upon the order then made is right, and that it was only an order that the Mikado might be made a defendant for the purpose of enabling the court to make the order which the court has made. He now says, "I know not, and I care not, whether my agents have infringed your patent law. I have property in this country, which property is my own. I demand that it shall be delivered to me, and I make myself a defendant in your court merely for the 359] purpose of your modifying *the order which you have made, so that my agents may not be injured in consequence of their delivering to me my own property." And the only order that the Master of the Rolls has made is that these goods may be delivered up to the Mikado; the meaning of which is that the mere fact of the Mikado taking these shells away shall not be considered as against Ahrens & Co. an infringement of the injunction. That is the whole effect of this order. The Mikado has a perfect right to have these goods; no court in this country can properly prevent him from having goods which are the public property of his own country. Therefore it seems to me that this order, which is really made for the benefit of Ahrens & Co., was an order rightly made, and that this appeal cannot be sustained.

COTTON, L.J.: We have not got the order appealed from, because it has not been drawn up, but in substance it is either that the Mikado should be at liberty, notwithstanding the injunction, to take away the shells in question, or that some defendants to the suit should, notwithstanding that injunction, be at liberty to deliver them to the Mikado, thus leaving the injunction against the defendants to stand

as it was, though doing away with the effect of the injunction, in so far that the particular goods in question are no longer stopped.

The point, therefore, which has been a great deal argued does not arise, whether the defendants can justify an act which would otherwise be an infringement of the plaintiff's patent rights, on the ground that they were acting as agents for a foreign sovereign. That question does not arise, but undoubtedly if parties in England are doing that which is an infringement of a patent, they cannot justify it by saying that some one who has no power to authorize them to use the patent has authorized them to do so. Certainly, my judgment in this case in no way depends upon any such proposition. After that injunction had been granted, and assuming that the injunction was properly granted against the defendants in the suit, the Mikado came in and said, "These shells are public property of the country of which I am sovereign, and therefore I ought not to be prevented by that injunction from *taking these shells. The [360] injunction is not against me, but there may be a question whether the defendants could allow me to take these goods away without committing a breach of the injunction; therefore I come in and state that the shells are public property of the country of which I am sovereign, and I ask the court to give them over to me." In that proposition he is, I apprehend, clearly right. This court has no jurisdiction, and, in my opinion, none of the courts in this country have any jurisdiction, to interfere with the property of a foreign sovereign, more especially with what we call the public property of the state of which he is sovereign as distinguished from that which may be his own private property. The courts have no jurisdiction to do so, not only because there is no jurisdiction as against the individual, but because there is no jurisdiction as against the foreign country whose property they are, although that foreign country is represented, as all foreign countries having a sovereign are represented, by the individual who is the sovereign.

Then, what besides was argued? I think one argument was very much this, that if the foreign sovereign had been a private individual he could have had no property in these goods, because they were violations of the plaintiff's patent, or rather I should say more correctly, because they were to violate the plaintiff's patent. Now there, I venture to say, is a fallacy. The property in articles which are made in violation of a patent is, notwithstanding the privilege of the

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patentee, in the infringer if he would otherwise have the property in them. The court in a suit to restrain the infringement of a patent does not proceed on the footing that the defendant proved to have infringed has no property in the articles; but, assuming the property to be in him, it prevents the use of those articles, either by removing that which constitutes the infringement, or by ordering, if necessary, a destruction of the articles so as to prevent them from being used in derogation of the plaintiff's rights, and does this as the most effectual mode of protecting the plaintiff's rights—not on the footing that there is no property in the defendant. The court cannot proceed to give that relief and interfere with the articles unless it has before it the person entitled to the articles in question, and has as against this person power to adjudicate that the articles are made or used 361] *in infringement of the plaintiff's rights. As against a foreign sovereign, how could that be done? If these things, as on the evidence we must take them to be, are the property of the state of which the Mikado is sovereign, I can see no possible ground for interfering on any such principle as that on which the court acts when a defendant subject to its jurisdiction having been shown to have infringed the plaintiff's rights, the plaintiff gets this relief, that either the articles are destroyed or the objectionable portion is removed.

The only other point which we really have to consider is this. It is said that although under ordinary circumstances there is no jurisdiction as against a foreign sovereign, yet that in this particular case there is jurisdiction in consequence of the Mikado having come in and obtained the order of the 11th of May. It is said that a sovereign suing submits himself to the court as an ordinary plaintiff, and that the Mikado, in consequence of having obtained this order and acted upon it, puts himself in the position of an ordinary plaintiff. In the first place, there is this fallacy: the Mikado is not now in any way suing in the ordinary sense of the word, nor has he come to the court to establish as against an adverse claim his title to the property, which is really what is meant by a foreign sovereign coming here to sue to establish his rights. He is simply coming and saying, "The order of the court, possibly inadvertently, interferes with my sovereign rights. To prevent any question as to the defendants committing a breach of the injunction by allowing me to remove the property, make an order that they be at liberty, notwithstanding the injunction, to hand them over to me." So that, in my opinion, the very foundation for

the suggestion fails. But again, even if the Mikado had brought himself into court as an ordinary defendant, that, in my opinion, would not give the court jurisdiction as against the subject-matter, namely, jurisdiction to interfere with the public property of Japan, which is represented here by the Mikado. But when one comes to look at the form of the order, the Mikado does not by it come in as an ordinary defendant. By it he simply says, "I wish to bring before the court the facts: that these are my property, that the defendants were not constructing them under a contract for me, or using them under a contract with me. I wish to *show that they are my property. I wish to apply [362 for liberty to remove them as the public property of the state of Japan, and for that purpose, if necessary, I ask to come in." In my opinion, the order taken fairly must be read with reference to the purpose for which the Mikado applied, and that being so, although possibly the form is not very happy, it is like a conditional appearance entered where a defendant who considers himself improperly served with any proceeding has entered a conditional appearance, in order to contest the question, which he could not do without an appearance of some sort. It cannot, in my opinion, be said that the order puts the Mikado in the position of a plaintiff or of a person who is made *simpliciter* a defendant. He came in for the particular purpose of raising this question, and the form of the order, in my opinion, ought not in any way to prejudice the rights which he would have had independently of that order.

JAMES, L.J.: This appeal is dismissed with costs.

The costs of the shorthand writer's note of the proceedings before the Master of the Rolls were allowed.

Solicitors for plaintiffs: *Harrison, Beal & Harrison.*

Solicitors for the Mikado: *Wilson, Bristows & Carpmael.*

Solicitors for defendants: *Maples, Teesdale & Co.*

See 12 Eng. Rep., 65 note; 13 Eng. Rep., 681 note; 15 Eng. Rep., 693 note; Republic, etc., p. Roze, 15 Eng. R., 44.

[9 Chancery Division, 363.]

M.R., March 29: C.A., June 1, 22, 24; July 23, 1878.

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**In re* TUSSAUD'S ESTATE.

TUSSAUD V. TUSSAUD.

[1877 K. 13.]

Double Portions—Satisfaction—Election—Covenant to settle—Subsequent Will—Parol Evidence.

T., on the marriage of his daughter in 1867, covenanted with the trustees of her settlement that his executors or administrators would, within twelve calendar months after his death if he survived his wife, but if she survived him, then within six calendar months after her death, transfer to the trustees £2,000 consols to be held on the trusts of the settlement, which were for such persons as the wife, with the consent of the trustees or trustee for the time being, should appoint, and in default of appointment in trust for the wife for life for her separate use, then for the husband for life, and after the decease of the survivor, for such children of the marriage as, being a son or sons, should attain twenty-one, or being a daughter or daughters, should attain that age or marry, and if more than one in equal shares, and in default of children for the husband absolutely. In 1871 T. satisfied this covenant to the extent of one moiety. In 1873 he made his will, bequeathing £2,800 to trustees in trust for the daughter for life for her separate use, without power of anticipation, and after her decease for such of her children as should attain twenty-one in equal shares:

Held, by the Master of the Rolls, that the bequest of the £2,800 was intended to be in satisfaction of the testator's liability under his covenant in the settlement, and that such of the parties interested under the settlement as were interested under the will were put to their election.

Held, on appeal, that there were such substantial differences between the provisions made by the settlement and by the will as to rebut the presumption against double portions.

Parol evidence of the intention of the parties is admissible to rebut the presumption against double portions, and there is no difference in this respect between the cases of a deed and a will.

By a settlement dated the 4th of February, 1867, made on the marriage of Mr. and Mrs. White, a sum of £500 was vested in trustees upon trust to invest and to hold the trust funds after the marriage upon trust to pay and transfer the same to such person or persons and for such estate or estates and in such manner as the wife, with the previous consent of the trustees or trustee for the time being, should by any writing or by will appoint, and in default of any such appointment, and so far as no such appointment should extend, in trust to pay the income to Mrs. White *during her life for her sole and separate use, and after her decease, in default of any such appointment as aforesaid, to pay such income to Mr. White during his life, and after his decease in trust for all the children of the marriage who being sons or a son should attain the age of twenty-one years, or being daughters or a daughter should attain that age or

marry, and if more than one in equal shares, with a hotch-pot clause: and on failure of the preceding trusts and in default of any appointment under the power the fund was to be held in trust for the husband absolutely. The wife's father, Francis Tussaud, covenanted with the trustees that if the marriage should take place he would, on or before the 31st of August, 1867, pay to the trustees the further sum of £500, and that his executors or administrators should within twelve calendar months after his death if he survived his wife, but if not, then within six calendar months after her death, transfer to the trustees the sum of £2,000 consols. And it was declared that the trustees should stand possessed of such £500 and £2,000 consols upon the trusts declared concerning the original settled sum of £500. The £500 was paid according to the above covenant.

In January, 1871, Francis Tussaud paid to the trustees £1,000 cash, in part satisfaction of the covenant that his executors or administrators should transfer the £2,000 consols. At that time £1,000 consols were not worth so much as £1,000, but it was arranged that the cash should be taken in satisfaction of £1,000 consols, and the trustees released Mr. Tussaud from his covenant to that extent.

Francis Tussaud, by will dated the 30th of July, 1873, directed his trustees to stand possessed of a sum of £3,000, upon trust to pay the income thereof to Mrs. White for life for her sole and separate use, without power of alienation or anticipation, and from and after her decease upon trust as to the capital of the last-mentioned trust fund for such of the children of Mrs. White as should attain the age of twenty-one years as tenants in common if more than one, and if but one such child, then the whole of the trust fund to that only child. The residuary estate was given to the testator's sons. The will did not contain any direction for payment of the testator's debts. By a codicil the testator reduced the legacy to £2,800.

The testator died in September, 1873, and his wife in 1877. *A judgment having been given for administration of [365 the testator's estate, the trustees of the settlement claimed to prove as creditors under the covenant for the value of the remaining £1,000 consols, and the question arose whether the gift by the will was intended to be in satisfaction of the testator's liability under the covenant.

The case was heard before the Master of the Rolls on the 29th of March, 1878.

Davey, Q.C., and *Northmore Lawrence*, for the trustees
26 ENG. REP. 23

of the settlement: The covenant contained in the settlement by F. Tussaud to transfer to the trustees of Mrs. White's settlement the sum of £2,000 consols has only been fulfilled to the extent of £1,000 consols, and we contend that we are entitled to prove as against his estate for the remainder. It will be contended that the gift by the will of £3,000, which by the codicil was reduced to £2,800, for the benefit of Mrs. White and her children, was intended as a portion for her, and was a satisfaction of the covenant in the settlement. This, however, is not a case of double portions. Where, as in *Weall v. Rice* (1), there are only slight differences between the provisions in the two instruments, they will not repel the presumption as to double portions. Here, however, there is a substantial difference between the trusts of the settlement and the trusts of the will. Under the settlement Mrs. White had an absolute power of appointment over the trust funds overriding the other trusts. No such power is contained in the will. Under the settlement the husband had the second life interest, and in default of children was entitled absolutely. Under the will no interest is given to him at all. In *Lord Chichester v. Coventry* (2) it was held that great differences in the limitations of the trusts will be taken as indications that the gift in the will was not taken as meant to be in satisfaction of the covenant. Here the differences in the trusts are, we submit, quite as great as in *Lord Chichester v. Coventry*.

Owen, for J. R. Tussaud, one of the residuary legatees of the testator: The presumption in this case is that the legacy 366] in the will must *have been intended as a satisfaction of the covenant in the settlement. The case of *Lord Chichester v. Coventry* (2) is distinguishable, for there the first trust in the will was for the payment of the testator's debts. It is said that the fact of the husband taking an interest under the settlement, but being excluded under the will, favors the presumption that a double portion was intended; but that was the case in *Mayd v. Field* (3), and yet it did not prevent a case of satisfaction arising. The dispositions of the will show that the testator did not intend the daughter to take the £2,800 in addition to the amount remaining unsatisfied under the covenant in the settlement.

Ilbert, for another residuary legatee.

Solomon, for the executors.

Davey, in reply.

(1) 2 Russ. & My., 251.

(2) Law Rep., 2 H. L., 71.

(3) 3 Ch. D., 587; 18 Eng. R., 700.

JESSEL, M.R.: The law which I have to apply is by no means easy to apply, although I take it the long series of authorities have pretty well settled what the law is.

As I understand the law, the court presumes that the parents, including in the term "parents" the person or persons standing in the place of the parents, do not intend to give double portions to their children. When the portion is given on the marriage of a daughter by the father, as it is in this case, of course it is a portion, however it may be settled. The gift of a sum for the advancement of the daughter in marriage makes it a dowry, or a portion, therefore there is never a contest whether it is a portion or not when it is a gift by the father on the occasion of the marriage of the daughter. He may give it to the daughter at once, in which case it at one time went to the husband. In that case it was a portion, and under the statute of 29 Car. 2, s. 25, it would have been taken into account in a distribution as a portion. There is no doubt it is a portion, and the mode in which it is settled is utterly immaterial. When, however, a benefit is given to the child by will, it is not every benefit that has been considered a portion, and the *court, therefore, has always to decide, in the first [367 instance, what kind of provision made by a will is a portion, which very often is a difficult question.

Nobody would imagine, of course, that a father leaving a diamond necklace to a daughter would mean that to be a portion. In considering these cases you must take into account the nature of the benefit. Having got a sum of sufficient amount, as you have here, the next point to be decided is, how must the sum be limited to be a portion? There, again, there is room for a great variety of decisions. If the sum given to the daughter is of sufficient amount and given absolutely, then it is a portion, but supposing it is not given to her absolutely, what kind of limitations make it a portion for the daughter? You have to ascertain what it is that makes the sum given a portion to the daughter. Upon that subject there have been decisions.

In the first place, it has been held that a gift to the daughter for life, with a superadded power of appointment to dispose of it as she will, is in substance a provision for the daughter. That is pretty plain. She takes the real interest, and it is probably better secured for her than if it had been given to her separately for her absolute use.

It was held in the case of *Lord Chichester v. Coventry* (1), that such provision by will was a portion. Then the ques-

(1) Law Rep., 2 H. L., 71.

tion arose, supposing the testator gives it to his daughter for life as a married woman, with remainder to her children, is that a portion to the daughter? Of course the benefit to the daughter is a portion, but is the provision for the children, with a superadded power of appointment to dispose of it, a portion? The court decided, and, I think, in a rational and sensible way, that that is equivalent to the testator saying, "I give the sum as a portion to my daughter, and I settle it in the way I think a married daughter's portion should be settled;" and therefore it was held that a gift by will to a daughter for life with a remainder to her children was a portion to the daughter. That was held in the case of *Lady Thynne v. Earl of Glengall* (*).

Then there is another case. Supposing, besides a limitation to the daughter's children, you settle it on the daughter for life, and *the husband for life, and then the children, is that a portion? That is, is the whole sum a portion, or must you deduct from it the interest of the husband? There, again, the courts of equity, with their usual common sense, said, "No, that is also a settlement to the daughter; it is the way in which a prudent father would settle it." He gives it to the daughter's husband before the children, and the whole thing is a provision for the daughter settled by the father for the benefit of the daughter and her husband and children. That was settled in the well known case of *Weall v. Rice* (*), where the provision was in that shape.

It therefore comes to this, that wherever there is a sufficient sum which can reasonably be presumed to be a provision, and wherever it is so settled by the will in the ordinary way, the courts of equity have said, that is a daughter's portion within the rule to the extent of the whole fund. Having found out what is a portion within the rule, there arose this question, Does the rule as to double portions apply where the settlement is made by way of absolute gift before will? The case of absolute gift on marriage, or settlement on the marriage, or absolute gift without settlement on the marriage, was decided according to the rule of Roman law.

Then there came another case. Supposing a father had only bound himself to pay before will, but had not paid, did the rule apply then? It was held it did apply. If it was actually paid before, you could not take it away; but where it was not paid before, and the will also gave a portion, there the rule did apply, and the will provision was

(*) 2 H. L. C., 131.

(*) 2 Russ. & My., 251.

held to be a satisfaction, either in whole or in part, of the obligation to pay the portion which had been incurred by the father before the date of the will.

That matter being decided, there came another point, which was this, that the old rule, being a presumption of law, like all presumptions of law, could be rebutted. Of course it could be rebutted, and got rid of by extrinsic evidence, but it could also be rebutted and got rid of by intrinsic evidence—that is, where the two provisions were so inconsistent in their nature as to lead the court to the conclusion that the gifts were intended to be cumulative.

*Now, one can easily see cases in which that pre- [369]sumption would be rebutted by such considerations as these. Suppose the father, on the marriage of his daughter, gave £5,000 to the husband, of which the husband did not make a settlement—when I say “gave” I mean made a covenant or gave a bond to pay that sum to him—of course that would be equally a portion to the daughter whether the covenant to pay it was to the daughter and the daughter handed it to the husband, or the covenant was to pay it to the husband. If the father afterwards made his will, giving a sum to the daughter for life, with remainder to the husband for life, and with remainder to the children of the marriage, it would be difficult to say that that was not a provision, because, in the first place, there was no provision for the daughter at all. The second provision is a provision for the daughter. In that case, I think, the reasonable presumption would be that the father did intend his second provision to be an independent provision for his daughter. That is the point which the law regards. The subsequent limitation would be looked upon as a mere limitation of her portion in a sense for her benefit, being the best mode, as the father thinks, of disposing of her property. I can imagine a case of that kind to be clear; but when you come to intermediate cases, it is rather the impression produced on the mind of the judge than any rule of law which governs the case.

I think the rule has been correctly stated in the case of *Weall v. Rice* (1), which on this point appears to me to be approved of by the House of Lords, in the more recent case of *Lord Chichester v. Coventry* (2), “that where the two provisions are of a different nature, the two instruments afford intrinsic evidence in favor of a double provision. But in either case extrinsic evidence is admissible of the real intention of the testator. It is not possible to define what are to

(1) 2 Russ. & My., 251, 268.

(2) Law Rep., 2 H. L., 71.

be considered as slight differences between two provisions. Slight differences are such as, in the opinion of the judge, leave the two provisions substantially of the same nature, and every judge must decide that question for himself."

There is only one observation I have to make on the general *law. It has been held several times, and notably in the last case of *Lord Chichester v. Coventry* (1), that a presumption against double portions is more easily displaced where the obligation, or covenant, or settlement precedes the will, than where it follows. That being so, I have to consider what I believe is a new case as regards the limitations by the present settlement are very remarkable. There is a power given to the wife, with the consent of the trustees, to revoke the settlement altogether, and then, subject to that power, which may or may not be exercised, there are the usual trusts for the wife for her life, for her sole and separate use, and after her death the property is to be in trust for the husband for life, and then for such of the children of the marriage as shall attain twenty-one, or being daughters shall attain that age or marry; then, in default of children of the marriage, it is to be in trust for the husband.

Then we come to the will. The will gives, not the same sum, but a different sum, £3,000, out of the residuary estate, upon trust to stand possessed thereof, "and to pay the yearly income to my daughter," that is, the lady in question, Rebecca Marie White, "to her sole and separate use, without power of alienation, and after her death, to such children as shall attain twenty-one, and if but one, then such only child." There is a little difference in the trust. If there are no children, it falls into the residuary estate, and goes to his own sons. It is obvious that there are important distinctions as regards the two forms of settlement, and the question I have to consider is whether they are of sufficient importance to rebut the presumption that the testator did not intend the daughter to take both.

A further argument is that it is very difficult to settle the rights of the parties if you hold to the presumption. That is giving the go-by to the question, but the moment you find by law or by the circumstances of the case that it is intended that it shall be taken in satisfaction, the doctrine of election comes and solves all difficulties. Therefore, if there had been unrestricted power to the married woman, if she had elected to take under the will, she could not have

(1) Law Rep., 2 H. L., 71.

exercised the power. The question is, does *the rule [371] apply when you have these two settlements together; is there any reason for applying it, or is there not a reason for not applying the rule?

We have the case of *Mayd v. Field* (*), in which these questions were considered. In the case of *Lord Chichester v. Coventry* (*) it was held that where there was no provision for the children by the will, where the provision was for the lady for life with remainder as she should appoint, whilst by the marriage settlement there was a provision for the husband and children, there was such a material difference that the court would not hold that the one was intended to be the same as the other.

Now, although I strongly suspect that what I am about to say will not carry out the intention of the testator, I feel myself bound by the law to say that the substance of the provisions is not to be set aside for slight differences in the nature of the provisions, and I also feel bound to say that when I look at these two settlements I cannot see that substantial difference which is necessary in my opinion. In the first place, the provision for the wife and children, or for the husband and children, will not stand in the way. In that form of settlement, the mere fact that the husband is left out in the second settlement raises no difference in my mind, because the settlement on the children is more beneficial as far as they are concerned.

But then it is said there is power to the wife, with the consent of the trustees, to dispose of the property absolutely. I am not impressed with that, because if it was a power to the wife alone, it is only for life. He has given her a larger provision in what he thinks a more beneficial way, by settling that with a restraint on anticipation, and by giving it afterwards to her children. I cannot see the inconsistency. He may have thought, and reasonably thought, that the larger sum of £3,000 was a larger provision with the remainder to her children, that is, a larger provision for her; for that is what the law says; he may have thought that the £3,000 provided for the daughter and settled upon her children was a better and more satisfactory provision than the power of disposing of £1,000 and remainder to her children. They appear to me to be provisions substantially of the same nature, and I *cannot bring my mind to see that there [372] is that important and substantial difference which should make the two provisions, so to say, of a different nature.

(*) 3 Ch. D., 587; 18 Eng. R., 700.

(*) Law Rep., 2 H. L., 71.

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In re Tussaud's Estate. Tussaud v. Tussaud.

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They are different forms of settlement for the benefit of the daughter. But they are, in my opinion, similar and not dissimilar forms of settlement, because the whole of the law assumes that you are beginning with the proposition that they are not identical before you can consider their similarity. I am of opinion, looking at the authorities, that there is no sufficient distinction between the nature of the two settlements, and that the rule applies.

Now, what is the effect of that? You cannot deprive the husband of his right and you cannot deprive the children of their right to get paid. What is the rule of election? Inasmuch as the persons who are to elect cannot compel third persons to come in, and therefore cannot make complete election by giving full effect to the will, they can only satisfy it so far as their interest extends. If, therefore, the wife comes in under the will, she can neither exercise her power nor take a life interest in the £1,000, but if she will come in under the will and codicil she can only take the £2,800. It is obvious, as far as the children are concerned, that their interest in the £1,000, which is postponed to two life interests, is less than their interests in the £3,000, which is only postponed to one, and as regards the £1,000 as the interest is so much the greater under the will than under the settlement, they will elect to come in under the will.

The order will be that, the court being of opinion that the legacy given by the testator is in satisfaction of the covenant in the settlement, the parties must elect under which instrument they will take.

The trustees of the settlement appealed. The appeal came on to be heard on the 1st of June.

Davey, Q.C., for the appellant, after opening the case, tendered in evidence an affidavit by Mr. White of declarations made by the testator rebutting the presumption that he intended to satisfy the covenant in the settlement. He referred to *Trimmer v. Bayne* (1); *Kirk v. Eddowes* (2); *Taylor on Evidence* (3).

373] *Bagshawe*, Q.C.: I object to the admission of this evidence. The question before the court is the construction of a will. Where the question is as to the construction of a deed *inter vivos* you can admit evidence of the intention of the parties, but where the construction of a will is in issue you cannot admit evidence of the testator's intention, although it is admissible as to the state of circumstances in

(1) 7 Ves., 598.

(2) 3 Hare, 509.

(3) 7th ed., p. 1023.

which the will was executed: (*Charter v. Charter* (1); *Hall v. Hill* (2)).

JAMES, L.J.: I am of opinion that this evidence is clearly admissible. Upon the authority of decided cases, and according to the opinion expressed in all the books, as well as the uniform course of practice, parol evidence is admissible to rebut a presumption, although not to raise a presumption. Mr. Bagshawe was driven to admit that if this instrument had been a deed, and a question had arisen whether the provisions of the deed were to operate as an ademption of a previous gift in a will, the evidence would have been admissible. But it is not reasonable to admit evidence as to the effect of a deed and to refuse to admit it as to the effect of a will. When we have to consider the effect of a will and a deed, the rules as to the admission of evidence must be the same whether the deed or the will was executed first. The authorities are uniform in favor of the admission of evidence in such a case as the present.

BRETT, L.J.: I am of the same opinion. The question is whether certain declarations of the testator ought to be admitted as evidence. There are two instruments, one a deed, the other a will, and it is said by one side that it is consistent with the terms of these two instruments that the trustee should receive the benefit both of the will and the deed, but that the courts of equity raise a presumption that the gift in the will was intended to be in satisfaction of the covenant in the deed, and that where that is the case the courts of equity have always allowed evidence of declarations by the testator to show that this was not his intention, and to rebut the presumption. On the other side it is said that the object of *such evidence is to construe the will, [374 and that, although extrinsic evidence is admissible in such a case to construe a deed, it is not admissible to construe a will. I know of no such distinction. As a general rule, no evidence is admissible as to the intention of a deed; you may admit evidence as to the surrounding circumstances to show the meaning of the instrument, but not to show what the parties intended to say. Nor can evidence be admitted to assist the court in construing a will. But it does seem to me clear that the courts of equity, when they hold that a presumption has arisen, have allowed evidence to rebut that presumption; and looking at the cases cited, they are consistent with what is laid down in Taylor on Evidence, that where there are two instruments, and where the circumstances are such that the Court of Equity raises a presumption

(1) Law Rep., 7 H. L., 364; 12 Eng. R., 1.

(2) 1 D. & War., 94.

that one is in satisfaction of the other, there the court will receive evidence of declaration of the parties to rebut such presumption; but where there is *prima facie* no presumption in equity, there the court will not allow evidence to be given to raise a presumption and to show the intention of the parties. The case of *Hall v. Hill* (¹) appears to me consistent with what is laid down in Taylor on Evidence on this point. In the present case I think the evidence is admissible.

COTTON, L.J.: I am of the same opinion. I will add nothing, except to say, that it is important not to relax the rule against admitting parol evidence to construe wills—that is, evidence to show what the will means. That you cannot do, unless there is a latent ambiguity—for instance, as to two legatees of the same name—or as to the meaning of terms of art. But here there is no such case. Here there is a daughter and her family entitled to a portion under a settlement, and then a will, in which you find a provision in favor of the same daughter and some of her family. You do not want to construe that; but the question arises, whether both portions are to be paid. You look at the will for some expression of intention whether one or both are to be paid. If you find no expression, then you are driven to a presumption of law, which only arises in the absence of 375] an expressed intention to give a *double portion. That is entirely independent of the construction of the will. When you come to a presumption to imply an intention in the will, then the rule always is that you may admit parol evidence to rebut such presumption. I know no distinction in this respect between a deed and a will. The whole fallacy lies in supposing that it is for the purpose of determining the construction of the instrument. You first construe the will, and if in any way a presumption arises, you admit evidence to rebut that presumption. This is quite consistent with the judgment of Lord St. Leonards in *Hall v. Hill* (¹). This evidence must therefore be admitted.

June 24. *Davey*, Q.C., and *Northmore Lawrence*, for the appellants: We contend that there is such a dissimilarity between the trusts as to rebut the presumption of satisfaction. Under the settlement the wife has a power of appointment, by virtue of which she might, with the consent of the trustees, dispose of the fund in any way, and the husband has a life interest. Under the will there is no power of appointment, and the husband takes nothing. The cases were fully discussed in *Lord Chichester v. Coventry* (²), and the result is that slight differences will not

(¹) 1 D. & War., 94.

(²) Law Rep., 2 H. L., 71.

rebut satisfaction, and that it rests with the court to say whether the differences are slight. All the Lords agreed in this, that the presumption against double portions is rebutted much more easily where the settlement precedes the will than where the will precedes the settlement.

[JAMES, L.J.: Can a married woman who is restrained from anticipation be put to her election?]

It is submitted not, *Robinson v. Wheelwright* ('); but the Master of the Rolls held that the court had power to lay hold of her interest before it came to her, and he directed an election on the same scheme as in *Mayd v. Field* ('). With the exception of that case there is hardly an authority to be found in favor of satisfaction, unless every person entitled under the prior settlement took something under the will. In *Weall v. Rice* (') the *same par- [376 ties took, and, as the court considered, substantially, the same interests. In *Lady Thynne v. Earl of Glengall* (') all persons who took under the settlement took under the will, though a further class of children was let in. *Bethell v. Abraham* (') and *Mayd v. Field* (') depart from this, but we submit that the departure is against principle. The Master of the Rolls relied on *McCarogher v. Whieldon* ('), where, however, a very whimsical result was produced by the election. There cannot be an intention to put the parties to election in this partial way.

Bagshawe, Q.C., and *Owen*, for a residuary legatee: It is for the court to say whether the differences are slight or not. The question is discussed in *Dawson v. Dawson* ('); and the question whether there is a direction in the will to pay debts is material: *Paget v. Grenfell* (').

[JAMES, L.J.: I do not see how that can be material. The executors must pay the debts just the same whether there is a direction or not.]

It was treated as material in *Coventry v. Lord Chichester* ('). *Bethell v. Abraham*, as far as it goes, is in our favor.

[JAMES, L.J.: We there came to the conclusion that the testator had in fact said that he intended satisfaction.]

The general rule is not to be departed from upon considerations which merely lead up to this, that the second

(') 6 D. M. & G., 535.

(') 3 Ch. D., 587; 18 Eng. Rep., 700.

(') 2 Russ. & My., 251.

(') 2 H. L. C., 181.

(') 3 Ch. D., 590 n.

(') Law Rep., 3 Eq., 286.

(') Law Rep., 4 Eq., 504.

(') Law Rep., 6 Eq., 7.

(') 2 D. J. & S., 343.

provision is not in all points a perfect substitution for the first.

Solomon, and Ilbert, for other parties.

Northmore Lawrence, in reply.

July 23. COTTON, L.J., now delivered the judgment of the Court (James, Brett, and Cotton, L.JJ.):

This is an appeal from a judgment of the Master of the [377] Rolls, *whereby he in effect decided that a sum of £2,800 which Mr. Tussaud, the testator in the cause, settled by his will for the benefit of Mrs. White and her children, was intended to be in satisfaction of his liability under a covenant contained in a settlement made previously to the marriage of Mrs. White, and that such of the persons interested under the settlement as were also interested under the will must elect under which instrument they would take.

The facts are these: Mrs. White was a daughter of the testator. In February, 1867, a settlement was executed previously to and in contemplation of her marriage. By that settlement Mr. Tussaud, the testator, covenanted with the trustees that his executors should, within six months from his death if he should survive his wife, or, if he should predecease her, then within six months from the death of his wife, transfer to the trustees £2,000 consols. It was declared that these consols, when transferred, should be held upon trust for such persons as Mrs. White, with the previous consent of the trustees, should from time to time, notwithstanding coverture, by any writing or by her last will, direct and appoint, and in default of such appointment upon trust for Mrs. White for her life for her separate use, after her death for her husband for his life, and after the death of the survivor for the children of the then intended marriage who should attain twenty-one, or in the case of daughters marry under that age; and in default of children, in trust for Mr. White, his executors, administrators, and assigns. In the year 1871 the testator paid £1,000 to the trustees of the settlement in part performance of his covenant to the extent of £1,000 consols. In 1873 the testator in the cause died, having made his will, which was dated on the 30th of July in that year, and by his will and a codicil thereto he directed that £2,800, part of his estate, should be held by trustees upon trust for Mrs. White for life for her separate use without power of anticipation, and after her death for her children by any marriage who should attain twenty-one. If there were no children who attained a

vested interest, the fund fell into the residue and went to the testator's own sons. At the time of the testator's death his liability under the covenant was reduced to £1,000 consols.

*The Master of the Rolls decided that the legatees [378 claiming under the will were bound to elect between the provision made for them by the will and that made by the settlement, on the ground that there was not sufficient to prevent the presumption that a father does not intend to make a double provision for a child from applying to the case. It is well established that there is such a presumption which as stated by Lord Cranworth in *Lord Chichester v. Coventry* (1), "is in these cases founded on the assumption that in making the second instrument the maker of it supposes himself to be substantially satisfying the obligations of the first." But this presumption must yield to any sufficient indication of intention on the part of the maker of the instrument, if expressed on the face of that document, or if there is no expression of intention on the face of the instrument, it may, like any other presumption of law, be rebutted by extrinsic or parol evidence to show what was the intention of the testator when he made his will. In the present case, Mr. Davey tendered parol evidence to rebut the presumption, and this, after argument, we held to be admissible. But after having heard the evidence, we are of opinion that it does not aid the case of the testator's daughter, Mrs. White, and her children.

The question therefore must be, is there sufficient on the face of the will to show that the testator did not intend the provision thereby made to be in lieu of that made by the settlement, or, in other words, to satisfy his obligation under that instrument? In arriving at a conclusion on this question, we must, of course, look at the settlement, for the purpose of seeing what the obligations of the testator under that instrument and the provision thereby made for his daughter's family were. What we have to consider is well expressed by Lord Colonsay in the case of *Lord Chichester v. Coventry* (1), in these words: "But I can conceive no consideration more important upon a question of double portions than the consideration of whether the parties to be benefited by the one are the same as the parties to be benefited by the other, or whether the nature of the benefit conferred in the one case is the same as the nature of the benefit conferred in the other." It must be remembered that slight differences between the two provisions *will not be [379

(1) Law Rep., 2 H. L., 89.

(2) Law Rep., 2 H. L., 98.

sufficient to prevent the presumption from arising. Slight differences, however, in the words of Sir John Leach, in *Weall v. Rice* (¹), are such "as, in the opinion of the judge, leave the two provisions substantially of the same nature;" and he adds, "every judge must decide that question for himself." What, then, are the differences in the present case between the two provisions? In the first place, under the settlement Mrs. White, with the consent of the trustees, had an absolute power to deal in any way she thought fit with the fund which the testator had thereby convenanted to settle. The will did not give Mrs. White any such power. Under the settlement Mr. White took, subject to the life estate of his wife, a life interest in the fund; and if no children attained a vested interest, he, unless his wife dealt with the fund under the power, became absolutely entitled thereto, while under the will no interest was given to him in the legacy thereby settled; and if there was no child of Mrs. White who attained a vested interest, the settled fund went to the testator's sons. These differences, in our opinion, cannot be considered as slight. They are substantial differences between the two provisions. However, if the legacy given by the will was intended to be a satisfaction of the testator's obligation under the settlement, it could only be so by putting the parties claiming under the will to their election; and the fact that one of the persons who took a substantial interest under the settlement takes no interest under the will is a strong reason for coming to the conclusion that the testator did not intend the gift by will to be in lieu of, or in satisfaction of, his liability under the former instrument. In our opinion it is erroneous to treat the difference between the persons interested under the two interests merely as creating a difficulty in carrying into effect the testator's intention. If the intention is expressed, it must be carried into effect so far as practicable, and difficulties in completely effecting the intention cannot alter the construction. But where the court has to determine whether a presumption arises—that is, whether a particular intention ought to be assumed—the circumstance that the limitations of the will, as to which there is no doubt, are not consistent with effect being given to that intention which the court is asked to 380] presume, is a strong argument *against assuming that the testator had any such intention. We are of opinion that there are such substantial differences between the provision made by the will and that made by the settlement, both of which we consider as portions provided for

(¹) 2 Russ. & My., 268.

the testator's daughter, Mrs. White, as prevent the presumption against double portions applying to the present case—that is, as satisfy us judicially that the testator did not, in making his will, suppose himself to be substantially satisfying the obligations of the settlement.

It is unnecessary for us to go through the numerous cases which were referred to in argument. But it must be remembered that the case is one, not of ademption, but of satisfaction, and the two classes of cases are pointedly distinguished in the case of *Lord Chichester v. Coventry* ⁽¹⁾. In a case of ademption, where the will is first, that is a revocable instrument, and the testator has an absolute power of revoking or altering any gift thereby made. But where the obligation is earlier in date than the will, the testator, when he makes his will, is under a liability which he cannot revoke or avoid. He can only put an end to it by payment, or by making a gift with the condition, expressed or implied, that the legatees shall take the gift made by the will in satisfaction of their claim under the previous obligation. It is therefore easier to assume an intention to adeem than an intention to give a legacy in lieu or in satisfaction of an existing obligation. We mention this to show that many decisions where, in cases of ademption, differences between the two provisions have been held insufficient to prevent the presumption against double portions from applying, cannot be considered as authorities in the present case. There are very few cases in which a gift by will has been held a satisfaction of a previous liability, in which the persons interested under the will have not included all interested under the previous settlement. *McCarogher v. Whieldon* ⁽²⁾ was, however, such a case. But the decision in that case cannot be considered as proceeding on any principle inconsistent with our present decision. There, by the settlement, the testator had covenanted to leave one-fifth of his residuary estate to trustees for his son for life, then for his intended wife for life, and afterwards for their children; and all that the Master of the Rolls in that case decided was that an absolute bequest to the son of one-fifth of [381] the testator's estate was a satisfaction of the life interest which the son took under the father's covenant in one-fifth of his estate.

In our opinion the decision of the Master of the Rolls must be reversed, and a declaration made that the provision made by the will and codicil for Mrs. White and her chil-

(1) Law Rep., 2 H. L., 71.

(2) Law Rep., 3 Eq., 236.

1878

Ex parte Fletcher. In re Hart.

C.A.

dren is not to be considered as a satisfaction of the testator's liability under the covenant in the settlement.

Solicitors: *H. S. Smith; J. E. Turner; J. G. Joyce; W. A. Crump & Son.*

See 16 Eng. Rep., 821 note.

Where a will provided that two daughters, among several children, should receive the proceeds of certain life insurance, and that if this did not make their shares equal to those of the other children, the deficiency should be made up from the balance of the estate; held, that they were not entitled to the life insurance, and, in addition, to as much as each of the other children: *Kyne v. Kyne*, 48 Iowa, 21.

Where a will provided a bequest to the eldest son of a certain sum, "being the inheritance of his mother deceased," and, in subsequent clauses, provided that in the event of remarriage of the wife, she should have half the estate, the remainder to be divided among the children equally, share and share alike, held, that the first bequest to the son was absolute and not affected by the other conditions of the will: *Van Rheen v. Veenstra*, 47 Iowa, 685.

[9 Chancery Division, 381.]

C.A., July 25, 1878.

Ex parte FLETCHER. *In re* HART.

Court of Bankruptcy—Jurisdiction—Duty of Trustee—Order for Delivery of Possession of Land—Foreclosure—Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), ss. 20, 65, 72.

When a stranger to a bankruptcy is willing to submit to the Court of Bankruptcy the determination of his rights in relation to property of the bankrupt, it is improper for the trustee in the bankruptcy to raise objections to the exercise of jurisdiction by that court. Such a person ought to be encouraged to submit to the jurisdiction. *Quare*, whether the Court of Bankruptcy has jurisdiction to make an order for foreclosure.

Order made that the trustee in a bankruptcy should deliver possession of a house, of which the bankrupt had been weekly tenant, to the lessee of the house, who, as between himself and the bankrupt, was mortgagee of the lease from the bankrupt.

Ex parte *Dickin* (1) distinguished.

Observations on *White v. Simmons* (2).

(1) 8 Ch. D., 377.

(2) Law Rep., 6 Ch., 555.

[9 Chancery Division, 385.]

C.A., Aug. 6, 1878.

385] *LATIMER V. AYLESBURY AND BUCKINGHAM RAILWAY COMPANY.

[1878 L. 157.]

Vendor's Lien against Railway Company—Motion for Injunction and Receiver before Judgment.

Where the unpaid vendor of land taken by a railway company has commenced an action against the company to enforce his lien, the court will not grant an injunction or a receiver against the company before judgment has been obtained in the action, even though the company admit their liability.

THIS was an action by the Rev. E. W. F. Latimer against the Aylesbury and Buckingham Railway Company for specific performance* of an agreement for the purchase by [386 the defendants of a piece of land, part of the glebe of the parish, for the purposes of their railway for £221. The defendants entered on the land and constructed and opened their railway, but did not pay the principal or interest on the purchase money. The plaintiff prayed for specific performance and for an injunction and receiver.

The writ was issued on the 15th of June, 1878, and on the 17th of July, before the defendants had put in their defence, the plaintiff moved, before Vice-Chancellor Malins, for a receiver of the rents and profits of the piece of land, and for an injunction to restrain the defendants from running trains over it. In an affidavit filed in opposition to the motion, the secretary of the company did not deny their liability, but stated that he had been already appointed by the Master of the Rolls receiver in three other suits against the same company; and that he was bound to pay into court in those suits all the surplus of the receipts of the company over their necessary expenditure.

Vice-Chancellor Malins refused to make any order on the motion, except that the costs should be costs in the cause, and that the action should be transferred to the court of the Master of the Rolls.

From this order the plaintiff appealed.

Townsend, for the appellant: The court has on several occasions granted an injunction and receiver to an unpaid vendor against a railway company after a decree establishing his lien. There is no distinction in this respect between a railway company and an ordinary purchaser. It is true that in some cases the court has refused an injunction on interlocutory motion before decree; but there is no reason or principle for this distinction when the company, as in the present case, do not dispute their liability, and the refusal of the motion would only increase the expense of both parties: *Pell v. Northampton and Banbury Junction Railway Company* ('); *Wing v. Tottenham and Hampstead Junction Railway Company* ('); *Cosens v. Bognor Railway Company* ('). At all events, the plaintiff is *entitled to a [387 receiver: *Williams v. Aylesbury and Buckingham Railway Company* (').

Farwell, for the defendant company, was not called on.

(') Law Rep., 2 Ch., 100.

(') Law Rep., 3 Ch., 740.

(') Law Rep., 1 Ch., 594.

(') 28 L. T. (N.S.), 574.

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Latimer v. Aylesbury and Buckingham Railway Co.

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JAMES, L.J.: The decision in *Pell v. Northampton and Banbury Railway Company* (¹), where an injunction before decree was refused, is binding upon us, and it appears to me to be a correct decision. No doubt the company has taken the plaintiff's land and has not paid for it, but that does not enable us to make this order. If the plaintiff is entitled to judgment in the action he will get judgment at the hearing; but this application for an injunction and receiver is wrong. An interlocutory application to restrain a railway company from running their trains is monstrous.

Then, as to the appointment of a receiver, a receiver could only be for the particular portion of the line purchased from the plaintiff. What could the receiver do with that? He could not manage the line, he could not receive the tolls. All that he could receive would be the proportion of the net profits of that small portion of the line after paying all the working expenses and other outgoings. Such an order cannot be made before judgment.

BRETT and COTTON, L.JJ., concurred.

Solicitors: *Evans, Foster & Rutter; Burchells.*

(¹) Law Rep., 2 Ch., 100.

Where land has been taken under the exercise of the right of eminent domain, and a question is pending in a court of law as to the amount of compensation to which the landowner is entitled, he will be protected in his constitutional right to possession of his property, until his compensation be ascertained and paid or tendered to him; and the company, in whose favor the condemnation is made, will not be permitted to take possession of the land on tendering so much of the compensation as is not in dispute, but will be restrained from so doing.

To secure the landowner in his constitutional right, and at the same time to spare the company unnecessary delay, the court will, on the latter paying the landowner so much of the compensation as is undisputed, and the costs of the suit in this court, and paying into court an amount sufficient to cover the disputed claim, to the end that the landowner may have the same if adjudged by the court of law to be entitled thereto, permit the company to take possession of the land: *Wettler v. Easton & Amboy R. R. Co.*, 25 N. J. Eq., 214.

[9 Chancery Division, 388.]

C.A., Aug. 18, 1878.

*CROXTON V. MAY.

[388

[1868 C. 43.]

Woman past Child-bearing—Payment out of Court—Married Woman aged Fifty-four and Six Months.

The court refused to treat a woman as past child-bearing whose age was fifty-four and six months and had never had any children, but had only been married three years.

By a decree made on the hearing of this cause on the 30th of May 1870 (¹), it was declared that a certain legacy of £1,000 bequeathed to Mary Susanna Croxtan, the wife of George Croxtan, should be held, subject to certain payments, in trust for Mary Susanna Croxtan during her life for her separate use, and after her death in trust for all her children by her present or any future husband, and in default of children in trust for George Croxtan absolutely.

Mrs. Croxtan was married in 1861. A few months after their marriage she separated from her husband, but about three years before the filing of the petition they came together again, and had since been living together as man and wife.

Mrs. Croxtan was now of the age of fifty-four years and six months, and had never had any children.

Under these circumstances a petition was presented by Mrs. Croxtan and her husband, praying that the sum of £621 consols, which now represented the legacy of £1,000, might be paid to her on her separate receipt. Vice-Chancellor Bacon refused to make the order, and the petitioner appealed from his decision.

Cope, for the petitioner: The uniform practice of the court has been that in the case of a lady of this age the law will presume that there is no possibility of issue. In *In re Widdow's Trusts* (²) one of the ladies was fifty-three years and four months, and the other fifty-three years and nine months old. In *In re Millner's Estate* (³) the lady was *forty-nine years and nine months. In *Groves v. Groves* (⁴) Vice-Chancellor Wood mentioned fifty years as the age below which the court would presume a woman might have children. In *Forty v. Reay*, cited in Dart's

(¹) Law Rep., 9 Eq., 404.(²) Law Rep., 14 Eq., 245; 3 Eng. R.,(³) Law Rep., 11 Eq., 408.

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(⁴) 12 W. R., 45.

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Vendors and Purchasers ('), the age of fifty-three was considered the limit.

JAMES, L. J.: I think that in the particular circumstances of this case the Vice-Chancellor was justified in refusing to make this order. In all the cited cases the lady was either unmarried or had been married for many years without having children. In the present case the lady's married life has practically been only about three years. The appeal must be dismissed.

BRETT and COTTON, L. JJ., concurred.

Solicitors: *Kingsford & Co.*, agents for W. J. Cowper, Newbury.

(¹) 5th ed., 345.

See 13 Eng. Rep., 677 note.

In the devolution of estates, the law presumes that the possibility of bearing children exists even when a woman has passed the age to which the ability to do so usually continues. The law will not presume the physical impossibility of bearing children after the age of seventy-five years: *List v. Rodney*, 83 Penn. St. R., 493, 492.

This case was based on 2 Black-

stone's Com., 125; *Coke on Littleton*, 28 a, and the case of *Jee v. Audley*, 1 Cox's Chy., 824.

See also *Heasman v. Pearce*, L. R., 11 Eq. Rep., 534; *Matter of Sayer's Trusts*, L. R., 6 Eq., 819; 1 *Taylor on Ev.* (7th ed.), § 105; *Millner's Estate*, 3 Eng. Rep., 719; *Haynes v. Haynes*, 35 L. J. Rep. Chy., 303, and numerous cases cited in note.

[9 Chancery Division, 389.]

C.A., July 25; Aug. 1, 8, 1878.

Ex parte BROWN. In re REED.

Bill of Sale—Registration—Mortgage by Joint Tenants—Subsequent Assignment by one of them of his Interest to the other—Bankruptcy of Assignee—Fixtures—Reputed Ownership—Order and Disposition—Bills of Sale Act, 1854 (17 & 18 Vict. c. 36), ss. 1, 7—Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), s. 15.

On the 29th of April, 1876, two partners in trade executed a mortgage of their trade fixtures and loose chattels. The mortgage was not registered as a bill of sale. On the 7th of June, 1876, the partnership was dissolved, and the business was thenceforth carried on by one of the two partners alone. On the 29th of January, 1877, the outgoing partner executed an assignment of his half share in the mortgaged property to the continuing partner, subject to the mortgage. On the 22d of March, 1878, the continuing partner filed a liquidation petition. At the date of the filing of the petition the mortgaged property was in his sole possession. The retiring partner remained solvent. The mortgagees had not demanded possession of the loose chattels, but there was no evidence of any actual consent on his part to the change of possession:

Held, that the loose chattels passed by virtue of the reputed ownership clause to the trustee in the liquidation.

390] But *held*, that, as regarded the trade fixtures, the mortgage was, by reason of non-registration, void as against the trustee only to the extent of the liquidating debtor's original moiety.

When there is a mortgage of leasehold property and fixtures with a power of sale,

the Bills of Sale Act applies not only where the power of sale authorizes the mortgagee to sell the fixtures separately from the leasehold property, but also where there is a separate assignment of the fixtures.

Ex parte Barclay (1) explained.

THIS was an appeal from a decision of Mr. Registrar Hazlitt, acting as Chief Judge in Bankruptcy.

Percival Reed and John Scott Cavell carried on in partnership together the business of restaurateurs at The London, No. 191 Fleet Street. They were assignees of the lease of the house called The London (with the exception of a part of it known as the wine office and sample room), the lease having been granted on the 20th of August, 1864, to Frederick Sawyer, for the term of thirty-three years from the 24th of June, 1864, and they were, by virtue of an indenture dated the 30th of October, 1871, underlessees of the wine office and sample room for the residue of the same term of thirty-three years, except the last three days thereof. They were also, by virtue of an indenture of the 29th of April, 1876, lessees of the whole of the premises for a further term of ten years, to commence at the expiration of the term of thirty-three years.

By another indenture, dated the 29th of April, 1876, Reed and Cavell, in consideration of £6,500 advanced to them by John Brown, assigned and demised to Brown, his executors, administrators, and assigns, first, all the premises comprised in and demised by the lease of the 20th of August, 1864 (except the wine and sample room); secondly, the wine office and sample room comprised in and demised by the underlease of the 30th of October, 1871; thirdly, all the good-will and interest of Reed and Cavell in the business of restaurateurs carried on by them on the premises; and, fourthly, all the steam-engines, machinery, and other tenants' fixtures, fittings, decorations, plant, furniture, chattels, and other trade effects: To have and to hold the premises firstly assigned to Brown, his executors, administrators, and assigns, for the residue of the term of thirty-three years (except the last ten days thereof) *and [391 for all the term of ten years (except the last three days thereof): And to have and to hold the premises secondly assigned to Brown, his executors, administrators, and assigns, for the residue of the term of thirty-three years less three days granted by the underlease of the 30th of October, 1871 (except the last seven days thereof), and for all the term of ten years (except the last three days thereof): And to have and to hold the premises thirdly assigned unto

(1) *Law Rep.*, 9 Ch., 576; 10 *Eng. R.*, 605.

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Brown, his executors, administrators, and assigns absolutely, but subject as to all the premises assigned to a proviso for redemption on payment of £6,500, with interest, on the 29th of October, 1876. Whether by accident or by design there was in fact no habendum as to the premises fourthly assigned. The deed contained a joint and several covenant by Reed and Cavell for payment of the mortgage money and interest thereon, and a power for the mortgagee at any time after the 29th of October, 1876, to sell "the said premises hereinbefore expressed to be hereby assigned and demised respectively, or any part or parts thereof, either together or in parcels," and it was provided that, after any sale or sales should have been made under the power, Reed and Cavell and each of them, their and each of their executors, administrators, and assigns, or other the person or persons "in whom such of the last days not hereinbefore assigned or demised in the said several terms of years shall for the time being be vested, shall stand possessed of and interested in such last days of the said several terms of years as aforesaid upon trust for the purchaser or purchasers at such sale, and to assign and dispose of the same as such purchaser or purchasers shall direct." This deed was not registered under the Bills of Sale Act.

On the 7th of June, 1876, the partnership between Reed and Cavell was dissolved, and the business was thenceforth carried on by Reed alone. On the 29th of January, 1877, Cavell assigned to Reed all his half part or share in the premises comprised in the mortgage, but subject to the mortgage. On the 22d of March, 1878, Reed filed a liquidation petition, and on the 15th of April the creditors at their first meeting resolved upon a liquidation by arrangement, and appointed a trustee. At the time when the petition was filed the fixtures and the chattels comprised in the mortgage were in the sole possession of Reed. Brown had not
392] *demanded possession of the loose chattels, but there was no evidence that he knew of the assignment by Cavell to Reed. Cavell remained solvent. The Registrar made an order delaring that as against Brown the fixtures and other chattels formed part of the property of Reed.

Brown appealed.

Joseph Brown, Q.C., and *Buckley*, for the appellant: The Bills of Sale Act does not apply at all; the present case is not within the words of sect. 1 ('), even if, by virtue of

(¹) Sect. 1 provides that every bill of sale of "personal chattels" (which by sect. 7 is to include "fixtures") shall be registered within twenty-one days after the making or giving thereof, "otherwise such bill of sale shall, as

Lord Brougham's Act (13 & 14 Vict. c. 21, s. 4), the word "person" is to be taken to include "persons." The act applies only when all the makers of the bill of sale become bankrupt, the goods being in the possession of them all. Otherwise, the result would be, that the goods of a solvent man would be taken away from him and his mortgagee to pay another man's creditors, while he still remains liable upon his covenant to pay the mortgage debt. Such an injustice will not be permitted unless it necessarily results from the language of the act. If this is the right construction of the act it would follow equally that if Cavell had become bankrupt and Reed had remained solvent, the property would have gone to pay Cavell's creditors, though in that case Cavell could not have obtained credit by means of the possession of the property. The act does not apply to a case where the property in the chattels has been changed, and there has also been a notorious change in the possession since the execution of the bill of sale. The object of the Bills of Sale Act was to benefit the joint creditors of joint makers of a bill of sale, not the separate creditors of one of them.

*[JAMES, L.J.: Suppose the real owner of the [393 goods associates a dummy with him as co-grantor in order to evade the act?]

In such a case the goods would not be the goods of the dummy. The rights of the mortgagee cannot be affected by the assignment subsequent to the execution of the bill of sale. Nothing but an equity of redemption passed from Cavell to Reed. The effect of the act is to set aside the bill of sale as if it had never existed, i.e., to benefit the joint creditors of the grantors. At any rate, the bill of sale is valid as regards Cavell's original moiety of the property, and Reed's trustee can only take a moiety.

But even if the act applies, the deed did not require registration as regards the fixtures. There is no assignment of the fixtures separately from the house, there being no habendum as to them, and the power of sale does not authorize the mortgagor to sell the fixtures separately from the house. The words which authorize a sale "either together or in parcels" are satisfied by the existence of two leases of

against all assignees of the estate and effects of the person whose goods or any of them are comprised in such bill of sale under the laws relating to bankruptcy"y . . . "be null and void to all intents and purposes whatsoever, so far as regards the property in or right to

the possession of any personal chattels comprised in such bill of sale, which at or after the time of such bankruptcy" . . . "and after the expiration of the said period of twenty-one days, shall be in the possession or apparent possession of the person making such bill of sale."

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different parts of the house, and that this is the true construction of the power is shown by the trusts declared of the last days of the terms. The case is governed by *Ex parte Barclay* (¹), and not by *Ex parte Daglish* (²). In *Ex parte Barclay* (³) Lord Justice Mellish said that in the case of a mortgage of household property with fixtures, the test whether the mortgage required registration was whether power was given to the mortgagee "to sever the fixtures from the premises and to deal with them and sell them separately."

[JAMES, L.J.: That is the test only where the question depends upon the language of the power of sale; not where there is a separate assignment of the fixtures.]

There are not two testatums in the deed as there were in *Hawtry v. Bullin* (⁴).

And, as to the loose chattels, the reputed ownership clause does not apply, for though the mortgagee, no doubt, consented to their remaining in the possession of Reed and Cavell, there is nothing to show that he consented to their remaining in the possession of Reed alone, or that he even 394] knew that they were in his sole *possession: *Ex parte Dorman* (⁵). As between Reed and Cavell the former was in possession of the goods as a trustee for himself and Cavell; the assignment by Cavell to Reed was expressly subject to the mortgage. Cavell had a right to have the goods applied first in payment of the mortgage debt, just as when one partner goes out of a firm, leaving the other partner in possession of the partnership assets, the doctrine of reputed ownership does not affect the rights of the joint creditors.

[JAMES, L.J.: In that case there is no consent of the true owner.]

De Gex, Q.C., and *Yate Lee*, for the trustee, were called upon only on the first point: If this case is not within the very words of the act, it is certainly within the mischief of it. Why need the goods be in the possession of every one of the makers of the bill of sale? the words of the act are satisfied if the goods are in the possession of one of the makers when he becomes bankrupt. Cavell allowed Reed to remain in apparent possession of the property, and thus to obtain credit, and Reed was the sole owner of the goods subject to the mortgage. The appellant ought to have perfected his title by registration.

(¹) Law Rep., 9 Ch., 576; 10 Eng. R., 605.

(²) Law Rep., 8 Ch., 1072.

(³) Law Rep., 9 Ch., 582.

(⁴) Law Rep., 8 Q. B., 290; 5 Eng. R., 241.

(⁵) Law Rep., 8 Ch., 51.

Joseph Brown, in reply: The words of the act are carefully chosen; "person making such bill of sale" is not the same thing as "such bankrupt."

Aug. 8. JAMES, L.J.: The facts of this case are very few and are not in dispute. The liquidating debtor, Reed, and his partner, Cavell, executed a bill of sale of certain chattels in favor of the appellants, Brown. The deed was not registered. Cavell afterwards assigned his share in the goods to Reed, subject to Brown's security. At the time when he filed his petition Reed was in possession, or apparent possession, of the goods. The Registrar was of opinion that under these circumstances Reed's trustee was entitled to all the goods. It was contended with great ingenuity before us, by *Mr. Joseph Brown and Mr. Buckley, [395 that the Bills of Sale Act did not apply to such a case. They said, You must bring yourself within the very words of the act. The act says that an unregistered bill of sale is to be void as against the trustee in bankruptcy of the person whose goods are comprised in it as regards any of the goods which at the time of the bankruptcy are in the possession of the person making the bill of sale. Read the word "person" as "person or persons," still the bill of sale was made by A. and B., and the goods were found in the possession of B. alone. How can it be said that they were in the possession of "the persons making the bill of sale?" If that argument were to prevail, it would, I think, make the act illusory and misleading. Of course it would be a very simple thing for any one who wished to make a bill of sale to join a mere dummy with himself, for A. to make a bill of sale by A. and B. Then, when the bankruptcy happens, the goods are found in the possession of A. alone, and he could say "it is not within the act." That would be a very strained construction to put upon the act. But, on the other hand, it would be monstrously unjust if A. and B. were jointly possessed of goods and they together assigned those goods to a mortgagee, and A. afterwards became bankrupt, B. remaining perfectly solvent, having done nothing whatever to which the act attaches, not being within the act at all, that then B. and his mortgagee should lose the goods entirely because A. had become bankrupt. I think, however, that this puzzle which Mr. Brown put to us is not so very difficult to unravel if you eliminate from the consideration of it every adventitious circumstance. For instance, we have nothing whatever to do in the present case with any question of order and disposition. We have nothing to do with anything

arising out of the partnership which formerly existed between Reed and Cavell, nor with any title which subsequently to the execution of the bill of sale was passed from Cavell to Reed. What does the Bills of Sale Act really intend to provide? The object of it is to enable the creditors of an insolvent to treat as void a bill of sale secretly made by him. The bill of sale in the present case was made by A. and B., who were joint tenants. It was said that, being joint tenants, each of them was possessed *per mie et per tout*. That of course would be equally true of Reed and of Cavell. If Reed was possessed *per mie et per tout*, Cavell 396] *was equally possessed *per mie et per tout*. The substantial effect of the bill of sale, putting aside any technicality arising from joint tenancy, was an assignment by Reed of his moiety of the goods, which alone he could part with, and an assignment by Cavell of his moiety of the goods, which alone he could part with. Then the creditors of Reed say, "Your assignment is bad as against us." So it is. Strike out then his execution of the deed altogether as if his signature had been a forgery, as if it had been obtained from him by fraud. Then the deed is bad as against him and his creditors. What would be the result? His creditors would take the half which never passed by the deed, and Cavell, or the person who claimed under him, would take the other half. Reed was at the time when he filed his petition in possession of the half of the goods which he had purported to assign, but which he had not effectually assigned, by the bill of sale, and the result, according to my view of the case, is that the deed is good as to Cavell's original moiety, but it is bad as to the other moiety which Reed purported to assign, but which his creditors have under the act a right to treat as not having been assigned by him.

In my opinion, therefore, the Registrar's order ought to be varied by declaring that Reed's trustee and Brown are entitled in moieties to the fixtures in question.

COTTON, L.J.: I am of the same opinion.

We have already decided that the fixtures have been so dealt with in this case as to be within the Bills of Sale Act, provided that the person claiming them is a person against whom the bill of sale is said by the act to be void, and provided that the goods come within the description of goods "in the possession of the person making the bill of sale."

I had at first considerable doubt whether the bill of sale must not be treated as entirely void as against the trustee, so as to leave his title entirely unfettered by it. But, upon full consideration, I think that the act best agrees with the

construction that in the present case the trustee can only claim one moiety of the goods.

First let us look at the words of the act, and in dealing with the question we must construe the act fairly, not putting a forced *construction upon it, either in favor of [397 the party claiming under the bill of sale or in favor of the general creditors. What is the fair construction of the act? There are two things to be looked at—the person as against whom the bill of sale is to be void, and the goods in respect of which it is to be void.

The first point is this. A bill of sale not registered, as this was not, “shall as against all assignees of the estate and effects of the person whose goods, or any of them, are comprised in such bill of sale under the laws relating to bankruptcy be null and void.” I think that that refers to the goods comprised in the bill of sale, the goods which belong to the person who makes the bill of sale and afterwards becomes bankrupt, at the time of the execution of the bill of sale. That in the present case was one moiety only of the goods; the trustee is the trustee of a person who at the time of the execution of the bill of sale was entitled to one moiety only of the goods comprised therein, and the trustee is the person who is entitled to say that as against him the bill of sale is void. Then we come to the latter part of the section, which says that the bill of sale is to be void as regards goods, “which at the time of such bankruptcy shall be in the possession or apparent possession of the person making such bill of sale.” I think the fair construction and meaning of that is, goods in the possession of the person whose execution of the bill of sale would, but for the act, stand in the way of the title of the trustee, and in the present case the debtor’s execution would, but for the act, stand in the way of the title of the trustee as regards a moiety only of the goods. Putting a fair construction upon the statute, and giving to it its fair effect, in my opinion the bill of sale is made void as against the trustee in respect of that moiety only of the goods to which the debtor Reed was entitled at the time when he executed the bill of sale.

BRETT, L.J., was present during the argument, but was not present when the judgments were delivered.

The appeal was allowed without costs.

Solicitors for appellant: *Linklater, Hackwood & Co.*

Solicitors for respondent: *Carr, Bannister, Davidson & Morriss.*

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See 21 Eng. Rep., 164 note.

Although, as to personal property, the general rule may be that the law of the domicile of the contracting party governs, because chattels have no *situs* except that of their owner, still, if the contract be in relation to personal property situated at the time of contracting in the foreign jurisdiction, the *lex loci* should govern.

So where a piano was purchased in the state of Michigan, under a contract which by the courts of that state has been construed to be a mere bailment, and the purchaser removes to this state, the courts here will construe such contract in accordance with the rule established in Michigan, and the party, or those claiming the property through him, will acquire no other or greater right or ownership in the property than could have been acquired under the contract had he remained in Michigan.

The purchaser having no right under the contract to mortgage the property while residing in Michigan, he cannot, on removing to this state, execute a chattel mortgage which will be valid as against the claims of the bailor: *Waters v. Cox*, 2 Bradwell (Ills.), 129.

Where the members of a firm have their actual and permanent residence in one place, but transact their business at another where they board for part of the year, but with no intention of changing their domicile, a chattel mortgage given by them should be filed at their permanent place of residence: *Briggs v. Leitelt*, 41 Mich., 79.

The provisions of the act of 1833 (Laws 1833, chap. 279), as to the filing of chattel mortgages so far as they apply to canal boats, are superseded and replaced by those of the act of 1864 (Laws 1864, p. 993).

The filing of a mortgage on a canal boat (or a true copy thereof) in the office of the auditor of the canal department, as required by the act of 1864, gives it preference over all claims but existing claims, and, of course, preference over the claims of subsequent purchasers and mortgagees. No other filing is necessary: *Pickert v. Canal Boat*, 55 How. Pr., 205, Dis-

trict Court U. S., Southern District of New York.

Liens founded upon the necessities of vessels in foreign ports are never displaced by mortgage titles recorded in home ports: *Reeder v. Steamship George's Creek*, 3 Hughes, 584.

A mortgage of a vessel of the United States is not, as against the parties, and such persons as have actual notice thereof, rendered invalid by the failure to record it: *Moore v. Simonds*, 100 U. S. Rep., 145.

Where a party presents a deed of trust to the recorder, who indorses it as "filed for record," and the party immediately, and before any entry is made in relation thereto, withdraws it for the alleged purpose of having a government stamp placed on it, and it is not returned for record for more than a month afterwards, the first filing is not sufficient to give constructive notice of the existence of the deed.

An instrument to become constructive notice must in good faith be filed for record, and left with the proper officer for that purpose. His file mark is not in and of itself constructive notice, but evidence only that the proper steps have been taken to give constructive notice, which may be shown to have been indorsed through fraud or mistake: *Worcester Nat. Bank v. Cheeney*, 87 Ills., 602.

It is well settled that, as between the parties themselves, an unrecorded chattel mortgage is valid and binding; an administrator of the mortgagor of such unrecorded instrument is not a third person within the meaning of the statute, so as to enable him to withhold possession of the mortgaged chattels from the mortgagee on condition broken. He has no better title than his intestate had: *Griffin v. Wertz*, 2 Bradwell, 487.

A chattel mortgage, valid in other respects, is not invalid as against one purchasing of the mortgagor with knowledge of its existence, although not filed or renewed: *Gildersleeve v. Landon*, 78 N. Y., 609.

A person is not a purchaser in good faith where he purchases with notice of a prior mortgage: *Pickert v. Canal Boat*, 55 How. Pr., 205.

[9 Chancery Division, 398.]

C.J.B., May 6: C.A., June 20, 21, 1878.

***Ex parte HOPE. In re HOPE. [398]**

Liquidation Resolutions—Registration—Bona fides of Creditors—Small Amount of Assets—Assets dependent on Result of Litigation—First Meeting of Creditors—Examination of Debtor—Power of Meeting to overrule improper and irrelevant Questions—Ultra Vires Resolution—Discharge given to Debtor at Discretion of Trustee—Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), s. 125—Bankruptcy Rules, 1870, rr. 295, 301.

Want of *bona fides* will not necessarily be imputed to liquidation resolutions however small the assets immediately available may be, if the debtor has substantial *bona fide* claims the subject of pending litigation.

Ex parte Aaronson (1) distinguished.

The debtor, at a meeting of his creditors under a liquidation petition, is only bound to answer proper and material questions, and the meeting has power to prevent the putting of irrelevant or improper questions, or questions which are put, not in the interest of the creditors, but for a collateral object. But the decision of the meeting is subject to review by the Registrar or the court.

The creditors cannot delegate to any one their statutory power of granting the debtor his discharge. A resolution doing this is *ultra vires*. But the Registrar or the court can strike it out and direct the other resolutions to be registered without it:

Per JAMES, L.J.: *Semble*, that the effect of rule 301 of the Bankruptcy Rules, 1870, is to make the creditors, if they act *bona fide*, the sole judges whether the debtor has given sufficient information as to his affairs.

The statement of affairs of a debtor who had filed a liquidation petition showed that his unsecured debts amounted to £43,897 and his assets to £120. Besides this, he stated that he had two claims which were being prosecuted in two suits. As to one of them he said that he could not estimate its money value, but that there should be no difficulty in obtaining a very large sum, and as to the other he said that it was a claim for a considerable sum. At the first meeting of the creditors the solicitor and proxy of a company, who had been made defendants to one of the suits, but who had successfully demurred, and who were creditors for £82, the amount of their costs in the suit, put various questions to the debtor with reference to the claim in that suit. Ultimately the debtor objected to answer one of the questions put, and, on the advice of his solicitor, declined to answer any more questions, on the ground that the examination was really for the purpose of obtaining evidence to assist the defendants in their defence of the suit. The meeting approved of the debtor's refusal to answer, and resolved that the examination should not be continued. A creditor for £2,000, named Strousberg, who was present, told the meeting that he would for the benefit of the creditors prosecute the claims at his own risk. The creditors resolved by the proper majority, 1, that the debtor's [399] affairs should be liquidated by arrangement; 2, that Strousberg should be appointed trustee without a committee of inspection; 3, that the debtor's discharge should be granted when the trustee should certify his consent thereto in writing; 4, that, having regard to the fact that the matters forming the subject of the questions of the company's solicitor were *sub judice*, the debtor was perfectly justified in declining to answer such questions. The company and the defendants to the other suit opposed the registration of the resolutions, but the judge of the county court decided that they ought to be registered. The decision of the county court judge was reversed by Bacon, C.J.:

Held, by James and Brett, L.JJ. (*dubitante*, Cotton, L.J.), reversing the decision of Bacon, C.J., that there was not sufficient evidence to show that the resolutions

(1) 7 Ch. D., 713.

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had not been passed *bona fide*, and that they ought to be registered, with the exception of the third resolution, which was *ultra vires*.

Per Cotton, L.J.: It was doubtful whether the creditors, without further information as to the validity of the claims in the two suits, could have been acting *bona fide* in passing resolutions not merely for a liquidation by arrangement, but empowering the trustee to fix the time when the debtor should have his discharge.

[9 Chancery Division, 419.]

C.A., June 27, 1878.

419] **Ex parte* CRAWCOUR. In re ROBERTSON.

Bill of Sale—Registration—Agreement for Hire and conditional Sale of Furniture—License to seize—Bills of Sale Act, 1854 (17 & 18 Vict. c. 36), ss. 1, 7.

R., on the 29th of November, 1877, entered into an agreement with C. & Co. to hire some furniture from them, which was admitted to be of the value of £63. R. was to pay C. & Co. £10 on the signing of the agreement, £5 on the 4th of January then next, and £5 on the 4th of each succeeding month during the continuance of the agreement, and he was also on the signing of the agreement to deposit with C. & Co. promissory notes for the total amount of the instalments as collateral security, and without prejudice to their title to the furniture and to their rights under the agreement. In case of the furniture being seized by them under the agreement, the notes, or so many of them as should then be current, were to become void. In the event of non-payment of any of the notes when due C. & Co. might seize, remove, and retake possession of the furniture as in their first and former estate, notwithstanding any payments made by R., which payments were then to be forfeited to C. & Co. Upon payment by R. to C. & Co. of the full amount of £66 by the above instalments the furniture was to become his *property, but, until the whole of that sum had been paid, the furniture was to remain the sole property of C. & Co., and was only let on hire to R.

The furniture was delivered to R. and he gave the promissory notes. On the 9th of January, 1878, he filed a liquidation petition, under which a trustee was appointed, who took possession of the furniture, which was then in R.'s house. On the 19th of March, some of the monthly instalments being over due C. & Co. seized the furniture:

Held (reversing the decision of the Registrar) that the property in the furniture did not pass to R. until payment of the full amount of the instalments, and that consequently the agreement did not amount to a bill of sale by R., and did not require registration.

THIS was an appeal from a decision of Mr. Registrar Hazlitt, acting as Chief Judge in Bankruptcy.

On the 29th of November, 1877, an agreement in writing was entered into between W. A. Robertson, a trader, of the one part, and Lewin Crawcour & Co., upholsterers of the other part, which contained the following provisions:—

(1.) That Lewin Crawcour & Co. thereby let to Robertson, and he thereby hired of them the several articles of furniture and effects belonging to them mentioned in the schedule thereto, and which were admitted by Robertson to be of the value of £63 4s. 10d., adding thereto 5 per cent. on the said value less the amount of first instalment.

(2.) "The said articles of furniture and effects are hired by W. A. Robertson upon the following terms and conditions:

(3.) "W. A. Robertson is to pay to Lewin Crawcour &

Co. the sum of £10 on the signing hereof, £5 on the 4th of January next, and £5 on the 4th day of each succeeding calendar month during the continuance of this agreement, and is also on the signing hereof to deposit with Lewin Crawcour & Co. promissory notes for the total amount of the instalments to be paid hereunder, such promissory notes being given as collateral security, and entirely without prejudice to the title of Lewin Crawcour & Co. in or to the said furniture and effects, and of all rights reserved to them by this agreement, and subject to this stipulation, that, in case of the goods being seized and removed by Lewin Crawcour & Co. under clause 5, the whole of such promissory notes or so many of them as shall then be current, shall after such seizure and removal be given up on demand to W. A. Robertson, and shall from and after such seizure and removal become absolutely void.

*(4.) "W. A. Robertson is to keep the rent of the [421] premises in which the said furniture and effects are placed regularly and punctually paid, and not to part with possession of, remove, or otherwise deal with the said goods, or any part thereof, nor to part with the possession of, or assign his interest in, the house or premises wherein the said goods may be, without the consent in writing of Lewin Crawcour & Co. being first obtained.

(5.) "In the event of non-payment of any of the above notes on the days upon which they respectively become due, or of the breach of any of the conditions herein expressed to be performed by W. A. Robertson, or in case the said furniture and effects, or any part thereof, shall be seized or taken in execution under any process of any court either of law or of equity, Lewin Crawcour & Co. may by themselves, or others, their servants or agents, enter into any house or place where the said articles of furniture or any of them shall then be, and seize, remove, and retake possession of the same, as in their first and former estate, notwithstanding any payments made by W. A. Robertson, and Robertson shall be barred from commencing or maintaining any action of trespass or otherwise by reason of such taking possession as aforesaid, or of the temporary possession of the premises wherein the said goods may be, for such time as may be reasonably occupied in such removal, or for the recovery of any part of the moneys paid under this agreement, which, upon such default or breach as aforesaid, it is hereby agreed are to be absolutely forfeited to Lewin Crawcour & Co.

(6.) "Upon payment by W. A. Robertson to Lewin Crawcour & Co. of the full sum of £65 17s. 10d. by the instal-

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ments aforesaid the agreement shall be deemed completed, and shall thenceforth cease and determine, and the said furniture and effects shall become and be the property of W. A. Robertson; but until the whole of the said sum shall have been paid the said articles of furniture and effects shall remain the sole and absolute property of Lewin Crawcour & Co., and are only let on hire to W. A. Robertson, who hereby agrees to take all proper care of the same during the hiring, and, in case of damage by fire or otherwise, W. A. Robertson will bear the loss or risk."

The articles mentioned in the schedule to the agreement consisted of ordinary household furniture. Soon after the 422] execution *of the agreement they were delivered at Robertson's private residence. On the 9th of January, 1878, Robertson filed a liquidation petition, under which a trustee was appointed, who, on the 26th of February, took possession of the furniture comprised in the agreement of the 29th of November, 1877, which was still in the debtor's house, and remained in possession of it until the 19th of March, 1878, when Lewin Crawcour & Co. took possession of it. The instalments of rent due in February and March had not been paid. On the 22d of March the trustee obtained from the Court of Bankruptcy an injunction restraining Lewin Crawcour & Co. from removing the furniture, and the injunction was continued from time to time. On the 30th of March the trustee gave notice of an application to the court for an order declaring that the furniture formed part of the property of the debtor divisible among his creditors, and belonged to the trustee. This application was heard on the 24th of May, 1878. On behalf of the trustee it was contended that the hiring agreement was void as against him, because it had not been registered under the Bills of Sale Act, 1854; and, moreover, that he was entitled to the furniture as being, at the commencement of the liquidation, in the order and disposition of the debtor, with the consent of the true owners. On the latter point a number of affidavits were filed by Lewin Crawcour & Co. to prove that there is a notorious custom of letting furniture upon terms similar to those of the agreement of the 29th of November, 1877, and it was said that this custom excluded the operation of the reputed ownership clause. These affidavits were answered by a number of affidavits filed on behalf of the trustee, which denied the existence, or at any rate the notoriety, of any such custom. The Registrar held that the agreement ought to have been registered as a bill of sale, and that, by reason of its non-registration, it was void as against the trustee;

and on this ground, without going into the question of order and disposition, he made the order asked for, granting a perpetual injunction to restrain Lewin Crawcour & Co. from interfering with the furniture. Lewin Crawcour & Co. appealed.

Winslow, Q.C., and *Finlay Knight*, for the appellants: In *Ex parte Powell* (¹), where an agreement for the hiring of *furniture had been entered into, very similar in its [423 terms to the present agreement, it was held that the property in the goods did not pass to the hirer until all the instalments had been paid.

[JAMES, L.J.: Might not the appellants have got the whole purchase-money at once by negotiating the promissory notes?]

The notes were to be given up on payment of the instalments. It would have been a fraud on the agreement to negotiate them. The property did not pass to Robertson, and there could not, therefore, be a bill of sale by him.

Yale Lee, for the trustee: By the agreement the property passed to Robertson, and he at the same time mortgaged the furniture to the appellants. The agreement amounts to a bill of sale by him. This is the real effect of the transaction, and the parties cannot alter it by calling it by a different name. The court will not allow the provisions of the act to be evaded in this way. The agreement is nothing but a collateral security for the payment of the promissory notes.

JESSEL, M.R.: I cannot concur in the ground of the Registrar's decision. Whether it can be supported on other grounds will be a matter for discussion at a future time. The Registrar rested the title of the trustee simply on this, that the agreement was a bill of sale, and that it was void as against the trustee because it was not registered. It appears to me that the agreement was not a bill of sale by Robertson, who is the person by whom a bill of sale must have been executed if it is to be hit by the Bills of Sale Act. Robertson never had any property in the goods. Crawcour & Co., to whom they originally belonged, agreed to let them on hire to Robertson at a rent to be paid by instalments, with this further provision, that, until all the instalments had been paid, the property should remain in Crawcour & Co., and that, if any instalment should not be paid when it became due, they should be at liberty to retake possession of their own goods, and the instalments already paid should be forfeited to them. That does not*make the docu- [424

(¹) 1 Ch. D., 501, 505.

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ment a bill of sale executed by Robertson, or a license given by him to take possession of personal chattels as security for a debt. It is simply one of the terms of the letting for hire and conditional sale of the goods by Crawcour & Co. to him. When the liquidation petition was filed, some instalments of the rent being overdue, Crawcour & Co. attempted to take possession of their goods. It appears to me that they were entitled to do so, and that there was no reason for granting the injunction.

JAMES, L.J.: I am of the same opinion.

BRETT, L.J.: It is said that this agreement contains a license by Robertson to Crawcour & Co. to take possession of his goods, and that it therefore amounts to a bill of sale within sect. 7 of the Bills of Sale Act. The only way, however, in which Robertson could have any interest in the goods or any right to deal with them was by virtue of the agreement itself. It is said that the agreement passed the property in the goods to Robertson, and that by it he at the same time mortgaged the goods to Crawcour & Co., and gave them a license to seize them. The sole question therefore is, whether the property in the goods passed to Robertson. In my opinion the property did not pass by the agreement. To hold that it did would be clearly contrary to the expressed intention of the parties. Nor do I think that the property passed by the delivery of the goods, which was made in accordance with the agreement. In my opinion the property could not pass until all the instalments had been paid, and that has not been done yet.

The appeal was allowed, with costs fixed at £20, and the case was referred back to the Registrar to try the question of reputed ownership.

Solicitors for appellants: *Dixon, Ward & Co.*

Solicitor for trustee: *John Hands.*

See 25 Eng. R., 515 note; *Brown v. Marr*, 17 Scottish Law Reporter, 277.

Upon an agreement to sell property when the purchase-money shall be paid, the title in the meantime to remain in the vendors, the purchaser takes no title whatever but merely a right to acquire it in future. And if he, without having paid the purchase-money, sells and delivers the property to a third person, the latter, although he buys in good faith, and without notice of the claim of the original vendors, cannot hold the property as

against them: *Ballard v. Burgett*, 47 Barb., 646, 40 N. Y., 314.

Where the owner of an article of personal property, under an agreement in writing, delivered the same to another person to be used by him at the stipulated price or hire of ten dollars per month, to be paid monthly until the sum of sixty-five dollars should be paid, when the title to the same was to become vested in the person paying the money, the agreement did not constitute a sale. Under such agreement the title did not pass to the party receiving

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the property, and a sale of it by him to a *bona fide* purchaser conveyed no title: *Singer M. Co. v. Graham*, 8 Oregon, 19.

A bill of sale in this form, "Mr. W. H. bought of B. S. & Brother," naming the articles purchased, and stating the price of each, signifies—especially when read in connection with the fact that the property was delivered under it—that B. S. & Brother have sold to H. the articles named and the price given.

Such an instrument—when not made and delivered as a receipt, but to show and evidence the terms of sale, by specifying the species, quantity and quality of the several articles, with the prices, and when it declares, on its face, a sale of the property if accompanied by a delivery and acceptance of the property, becomes the evidence of the transfer of the title, and it cannot be contradicted by parol evidence that the transaction was not a sale but only a bailment.

Where liquors are delivered by liquor merchants to a tavern keeper to be by him retailed, the title to the property to remain in the liquor merchants until the property is sold, the liquors are liable to seizure and sale under executions issued against the tavern keeper: *Bonesteel v. Flack*, 41 Barb., 435.

This action was brought to recover the possession of certain personal property delivered to the defendant's intestate, upon the agreement that he should sell the same within sixty days for a certain price, and pay over to the plaintiffs the amount received therefor, and in case he failed to effect such sale, that he should return the property to them. Upon the trial the defendant produced an unsigned memorandum given by the plaintiff at the time of delivering the goods, by which it appeared that the goods were sold to the intestate upon a credit of sixty days: Held, that the plaintiff was not thereby precluded from showing the *true nature* of the transaction, even though it differed from the statement which they had made of it by their written admission: *Errico v. Brand*, 9 Hun, 654, dis-

tinguishing *Durgin v. Ireland*, 14 N. Y., 322; *Bonesteel v. Flack*, 41 Barb., 435.

One received a yoke of oxen to keep for the owner, and promised to provide food for them for their work, and to return them by a fixed day, or in case he should pay a certain sum of money by that day the owner was to release his right to them. The bailee sold them, and the vendee resold them before the term expired; and upon the expiration of the term, the money not having been paid, the owner, after a demand and refusal, brought trover against such vendee. Held that the action would not lie: *Vincent v. Cornell*, 13 Pick., 294.

C. & Co. agreed to let to W. a printing machine for nine months; the price (which was that usually given for the sale of such a machine) was to be paid in three instalments in a manner specially agreed on, and the machine was to be insured during the term of hire; if at the end of nine months the price stipulated were paid, the machine was to become the property of W. The machine was accordingly delivered to H., but before the full price had been paid it was pointed for a debt due by W. who had become insolvent. In an action raised by C. & Co. against the pointer to recover as damages the unpaid balance of W.'s debt due by them under the agreement; held (diss. Lord Young) that the form of the agreement, in so far as it had the color of a contract of hiring, was a mere device resorted to for the purpose of evading the operation of the bankruptcy laws; that the contract was really one of sale; that the property had passed; and that therefore the pointing had been competently executed: *Cropper & Co. v. Donaldson*, 17 Scottish Law Rep., 749.

Where rent was to be paid in wheat, to be delivered to the landlord, when threshed, in the granary, the landlord has no title to any specific part of such grain which may be attached and sold, until the same is so set apart for him, and a levy and sale of his interest before such division is void: *Koob v. Ammann*, 6 Bradwell (Illa.), 160.

[9 Chancery Division, 425.]

• V.C.H., Feb. 13, 14, 15, 19, 20 : C.A., June 24, 25, 1878.

**425] *RICHARDS V. SWANSEA IMPROVEMENT AND
TRAMWAYS COMPANY.**

[1877 R. 261.]

Lands Clauses Act, s. 92—Part of House—Part of Manufactory.

The plaintiff was the owner of a leasehold house in H. street, and of five freehold cottages in B. Row, which ran parallel to H. Street, the yards at the back of the cottages abutting on the back yard and buildings held with the house in H. Street. The plaintiff used the house in H. Street as a dwelling house and shop, and the buildings behind it as a candle manufactory, candle store, bread store, and provision store. One of the cottages in B. Row was turned into a storehouse, and was made to communicate with the H. Street premises, and was used as a back entrance to them.

A tramway company gave notice to treat for the five cottages in B. Row and the yards behind them. The plaintiff gave a counter-notice that the land proposed to be taken was part of premises occupied by him as a manufactory, and calling upon the company to take the whole of the premises; and on the company's refusal he brought an action asking for a declaration that he might not be compelled to sell the part only of his "manufactory buildings and land" which was comprised in the notice to treat; and for an injunction:

Held, by Hall, V.C., that the whole block of buildings constituted one "manufactory" within the meaning of the 92d section of the Lands Clauses Act, and that the company was bound to take the whole.

Held, by the Court of Appeal (affirming the decision of Hall, V.C.), that the whole block constituted one "house" within the meaning of the section :

Held, by Brett, L.J., that the whole block also constituted one "manufactory."

The words "house or other building or manufactory" in the 92d section of the Lands Clauses Act refer to three distinct things; and it is sufficient that the owner of premises, part of which is required by a company, should specify the premises which he requires them to take without stating whether he makes the claim on the ground that they are a "house," or a "building," or a "manufactory."

W. RICHARDS, the plaintiff in this action, was a provision merchant and baker in Swansea, and occupied buildings of a considerable extent, fronting on the west on High Street, and on the east on Bethesda Row.

The buildings fronting on High Street consisted of a leasehold dwelling house, shop, and office. Behind them were buildings used by him as a candle manufactory, candle store, bread store, flour store, and provision store, and 426] an open yard. Still further to *the east were stables, a bakehouse, ovens, a corn mill, an engine house and boiler, and then five freehold cottages and small yards, the cottages fronting into Bethesda Row. Four of the cottages were used as dwelling houses, but one, No. 5, and the yard behind it, had been converted by the plaintiff into a storehouse, and was made to communicate with the rest of his business premises; so that the door into Bethesda Row was

used as a back door for the use of persons going to any part of the plaintiff's buildings.

In February, 1875, the Swansea Improvement and Tramways Company, requiring part of the plaintiff's premises for the purpose of their undertaking, gave notice under the powers of the act passed in 1874, with which the Lands Clauses Act was incorporated, to take the five cottages and yards behind them.

The statutory powers of the company ceased on the 16th of July, 1877.

After some negotiation, the plaintiff, on the 7th of December, 1877, gave notice to the defendants that the land comprised in the notice was a portion of lands and premises occupied and used by him in his business as a merchant and manufacturer, and that he would not sell or part with the said portion or any portion of the said lands and premises unless the company would purchase and take from him the whole of the said lands and premises.

The company having refused to accede to this claim, the plaintiff brought the present action asking for a declaration that he ought not to be compelled to sell any part of "his manufactory buildings and land" between High Street and Bethesda Row, by reason of the company's act having expired, or in the alternative, for a declaration that the plaintiff ought not to be compelled to sell the part only of "his manufactory buildings and land" which was comprised in the notice to treat; and for an injunction in accordance with the declaration.

The plaintiff moved for an injunction, which was by consent turned into a motion for judgment. Numerous affidavits were filed and witnesses examined; much of the argument having regard to the question whether the plaintiff had converted the cottage, No. 5 Bethesda Row, with a *bona fide* view of using it for his business.

The motion came on for hearing before Vice-Chancellor Hall on the 13th of February, 1878.

* *W. Pearson*, Q.C., and *Millar*, for the plaintiff, [427 referred to the Lands Clauses Act, s. 92, and *Sparrow v. Oxford, Worcester, &c., Railway Company* (').

Dickinson, Q.C., *Bradford*, and *Horne-Payne*, for the defendants, cited *Spackman v. Great Western Railway Company* ('); *Gardner v. Charing Cross Railway Company* ('); *Reddin v. Metropolitan Board of Works* ('); *Salter v. Met-*

(1) 2 D. M. & G., 94.

(2) 1 Jur. (N.S.), 790.

(3) 2 J. & H., 248.

(4) 81 L. J. (Ch.), 660.

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ropolitan District Railway Company ('); *Furniss v. Midland Railway Company* (').

HALL, V.C.: I was desirous of leaving this case in a position in which my judgment as to what constituted "the manufactory" might not conclude the question as to the obligation of the company to take the entirety of this property, because it would have been more satisfactory to my mind if there had been some further evidence as to the user of the property. But I do not think it necessary or desirable that the decision of the case should be postponed for the sake of this further evidence, and I will express my opinion at once, and then the matter can go to the Court of Appeal either with or without the admission of additional evidence, as that court may think fit.

First, then, it has been strenuously argued (and much evidence has been gone into upon the point) that the plaintiff's claim in this case is not a *bona fide* one; that for the purpose of forcing the company to take the whole of what may be called his manufactory, he has created as a part of such manufactory that which was not *bona fide* a part of it. And in support of this it is said that until about the month of December, 1874, he was able to go on with his works and carry on his business very well without in any way using the cottage No. 5, in connection with his manufactory; and that it is a just conclusion that he has by a device sought to bring himself within the 92d section of the Lands Clauses Consolidation Act, when he otherwise would not have been within that section. It appears to me that the defendants [428] have not made out such a case. *The plaintiff was doubtless negotiating as to the line of this tramway before he altered No. 5; he had at one time wanted it to go by Thomas Street; he was afterwards shown another plan, which was the one now proposed to be adopted, and that he rejected, requiring the defendants to take the whole of his premises. It has been said that by this he meant the whole of that which was then his manufactory; but even if that was the case, there was no dishonesty or impropriety in a person situated as he was, and pinched for room with regard to his manufactory, saying, "This cottage is mine, part of my property is a manufactory, and until I get a notice to treat I will use this cottage for the purpose of my trade as part of my manufactory, for which I want more accommodation." And although he only made use of it for two months before the notice to treat (if that be true), I consider that the act of Parliament must be construed

(') Law Rep., 9 Eq., 432.

(*) Law Rep., 6 Eq., 473.

according to the state of things existing at the time when the notice to treat was given, and therefore, although in a sense he had been communicated with on the subject, I cannot hold that there was on his part any fraud or want of *bona fides*, or anything which would deprive him of the provisions for his benefit contained in the statute. That is my decision on this part of the case.

The next question is, what was the manufactory? First, as to the cottage No. 5. I consider it clear that, being used for the storage of sacks, it was used as part of the manufactory, and as such the company must take it. What else, then, was comprised in this manufactory? The plaintiff apparently began business not actually as a manufacturer, but as a chandler. In the course of time his business increased, and desiring to develop it, and to make articles which he dealt in, he certainly did become a manufacturer as regards an important part of his business; and at the time when this act of Parliament passed and when the notice to treat was given (putting out of question the use of this cottage for the sacks), a large portion of the whole of the buildings in his occupation was used by him as and constituted a manufactory. He manufactured articles and sold them at the shop, and part of the buildings was used either by himself personally or by those he employed in his shop for residential purposes. Part is now occupied by his manager, dwelling there in order to look after *not [429 merely the shop but also the manufacturing business, and it is thus used more or less in connection with and for the purposes of the manufacturing business. That being so, I think that in a liberal sense, at all events, all these premises may fairly be considered as included in the manufactory. As to the shop, it does not cease to be connected with the place where the actual manufacturing process goes on, or to be, in a fair sense, part of the manufactory, because in it the plaintiff sells other articles along with those which are manufactured on the premises.

As was said by Lord Westbury, who, to use his own expression, was favorable to companies rather than to the individual, "you must construe it in a liberal sense." I, construing it in a liberal sense, hold that all the premises have something to do with and fairly constitute part of the manufactory within the terms of the act of Parliament. It is said that the provision stores are not necessarily part of the manufactory, but it is not shown that they are any of them separately used. They are used as stores in connection with the business.

It appears to me, accordingly, that each and every part of the premises in question, the dwelling house, shop, stables, and everything else not included in the notice to treat which the plaintiff requires to be taken, comes fairly, reasonably, and properly within the description of a manufactory, or, at all events, of a manufactory or of buildings which the company are bound to take as a whole; although it may possibly be that some portion is a building which they are only obliged to take because it is part of the manufactory. Therefore there must be a declaration that the plaintiff ought not to be required to sell or convey to the defendants a part only of the manufactory and building described and referred to in the notice to treat served by the defendants, or any other part only of the plaintiff's said manufactory, building, and land, with an injunction to restrain them from entering upon or using such part only, or interfering with the possession or occupation or enjoyment thereof by the plaintiff, without purchasing the whole of the said manufactory.

From this decision the company appealed. The appeal came on to be heard on the 24th of June, 1878.

430] **Dickinson*, Q.C., and *Bradford*, for the appellants: We are content to argue the question without disputing the *bona fides* of the plaintiff. The plaintiff carries on no less than three businesses on the premises in his occupation, and it is absurd to call the whole premises one manufactory. The cottage in Bethesda Row is quite distinct from the rest of the premises. It is in no sense part of any of the plaintiff's manufactories; it has only been used as a place to store corn sacks, which is only a colorable user to make it appear part of the manufactory: *Reddin v. Metropolitan Board of Works* (1); *Falkner v. Somerset and Dorset Railway Company* (2). There are two things mentioned in the 92d section of the act: one is a "house or other building," the other is "a manufactory." The plaintiff in his writ has not required us to take the "house," but only the "manufactory, buildings, and land," of which the cottage in Bethesda Row cannot be held to form a part. But even if he had treated the premises as all one "house," he could not succeed; for in no sense is the cottage part of the plaintiff's house, nor would it pass under a devise of his house.

W. Pearson, Q.C., and *Millar*, for the plaintiff: It is immaterial whether the plaintiff described his premises in his notice to the company or in the writ as a house or a

(1) 10 W. R., 726.

(2) Law Rep., 16 Eq., 458.

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manufactory. If the case comes within the act the company are bound to take the whole. The 92d section refers to three things, not two; namely, a house, another kind of building, and a manufactory. The plaintiff's premises are certainly one of these three things. The cottage in Bethesda Row is part of the curtilage of the plaintiff's house: *Marrison v. London, Chatham and Dover Railway Company* (1); *Salter v. Metropolitan District Railway Company* (2). The fact of the plaintiff manufacturing one or more kinds of goods in a part of his house does not make it the less a house. But the plaintiff's premises also constitute one manufactory: *Grosvenor v. Hampstead Junction Railway Company* (3); *St. Thomas' Hospital v. Charing Cross Railway Company* (4); *Steele v. Midland Railway Company* (5); *Giles v. London, Chatham and Dover Railway Company* (6). [43]

Dickinson, in reply.

JAMES, L.J.: I am of opinion that the decision of the Vice-Chancellor in this case ought to be affirmed. Indeed I should have thought, but for the great length of time which the case occupied in the court below and here, and the very elaborate way in which it has been argued on a point which seems to me comparatively immaterial, that this really was a clear case. A great deal of the time of the court below was taken up with that which was really the question the parties came to try, namely, the question of *bona fides*, that is to say, whether the plaintiff had not in fact *mala fide* made that thing a part of his house which was not otherwise a part of his house.

But in this court we have been relieved from that question of *mala fides*, and that being so, it appears to me that we have nothing whatever to do with the times, or the mode, or the circumstances at or under which the property came to exist in the manner in which it did exist at the time the notice was given. It appears to me that it must be tried exactly in the same way as if the site of the whole mass of buildings had been the year before a piece of unoccupied ground, and the plaintiff had, for the purpose of his residence and of his business, for the purpose of manufacturing that which he wanted to manufacture, built for the first time the mass of building which is now found to exist; and if that had been so built originally, and as one continuous structure, for one common purpose, it appears to me that,

(1) Law Rep., 6 Eq., 101.

(2) Law Rep., 9 Eq., 432.

(3) 5 W. R., 812.

(4) 1 J. & H., 400.

(5) Law Rep., 1 Ch., 275.

(6) 1 Dr. & Sm., 406.

as a question of fact, nobody could doubt that the whole thing was one building, or I would rather say, one "house." Of course the word "house" does not mean, it seems to me, necessarily a mere dwelling house, or a house only used, or exclusively or principally used, for a residence; the word "house" includes a shop, or may consist of a shop. The word "house," beyond all question, as it seems to me, would include a very large inn, or anything of that kind which 432] was built for one *purpose. It has been held to include St. Thomas' Hospital, which was a much stronger case than anything we have before us.

Assuming, then, this to have been originally built—and I think it must be treated exactly on that footing—for the purpose to which it was at the date of the notice applied, then it was one building, it was one house. There was internal communication between every part of that building. The door in the High Street may be described, and I should describe it myself, as the front door of that house. The door in Bethesda Row, in the cottage that was No. 5, may be described, and I should myself describe it, as the back door of that house, serving every purpose whatever for which a back door could be used.

Now, if the whole of this had been used by the plaintiff for his own residence merely as a private house, there could be no question, as it seems to me, that the whole was one house; and although I have had occasion more than once to consider the matter, I am still of opinion, and will repeat it, that according to my view a house is not the less a house because it is a public house or an inn; that it is not the less a house because it comprises or is used for the purpose of a shop, or because it comprises or is used for the purpose of a workshop or storehouse.

Then, this being a house, all connected with one course of occupation and user, the plaintiff uses some of the rooms for living in, first in his own person, and afterwards by his servants; he uses other parts of it for selling goods, other parts for making bread, other parts for making candles, other parts for grinding corn, and other parts for stables in which the horses are lodged that he finds it convenient to use. It seems to me, unless we are to start with a proposition that a house ceases to be a house, either partly or partially, because part of it is used for the purpose of business, that this is as much a house as if it had been originally built in the exact shape in which it now is, and every room in the house as they are placed had been used for the purpose of a private residence. It seems to me in that view that the

plaintiff was right in saying, "You must not take part of that without taking the whole."

Now, did he in any way lose this right by the manner in which he shaped his claim originally, or in which he gave what is called *or may be used as a counter-notice, [433 which I believe a man is not obliged to give? Did he in any way lose his right to enforce what he is now asking us to enforce for him? I am of opinion that he did not lose that right. He is not obliged to say exactly in what light he views his property. He is not obliged to say, "I ask you to take it because it is part of a house," or, "I ask you to take it because it is part of a building," or, "I ask you to take it because it is part of a manufactory." He is not obliged to tell his adversary, the company, exactly the ground upon which he is going to bring himself within the act of Parliament. What he says is, "You are taking part of something, and I am willing and ready to sell you the whole of that something." He might describe that in any way he likes. He might describe it by metes and bounds, instead of calling it, as he did here, "land occupied and used by him in his business of a merchant and manufacturer." He might have sent the company a plan of the whole, and said, "That is a plan of the whole, and I ask you to take the whole." At all events, if there was any doubt as to what it was he was requiring them to take, the company have made him describe it accurately in the amendment of his writ. Therefore it seems to me that the plaintiff was not under any difficulty arising from the notice, and that being so, I come to the conclusion that it was part of one continuous building used as one continuous building, and I am of opinion that the plaintiff was right, and that the order of the Vice-Chancellor must be affirmed.

The Vice-Chancellor put it upon the ground that it was part of a manufactory. I do not think it necessary to go into that part of the case, as to whether it is part of a manufactory or not. Although I confess I should have had some doubt about it, I certainly am not prepared to express a dissent from the conclusion to which the Vice-Chancellor came, having regard to the extent to which manufacture is carried on here. And although there are different manufactures in one sense, they are connected with one business, the business of selling afterwards. I am not, therefore, prepared to express my dissent from the ground upon which the Vice-Chancellor based his judgment. However, taking, as I do, a very strong and clear view on the other part of the case, I do not think it necessary to go any further into

434] that part of it. I am *of opinion, therefore, that the appeal should be dismissed with costs.

BRETT, L.J.: I am also of opinion that this judgment should be affirmed, and I am of opinion that it should be affirmed on the ground that this was one house, a part of which was taken, and also that it was one manufactory, part of which was taken; and that if it was only one house it was also a manufactory; but even if it is to be taken to have consisted of more than one house, it was nevertheless one manufactory. It seems to me that the case has raised a question on the construction of the act of Parliament, and also a question of the treatment of facts. With regard to the construction of the act of Parliament, in my opinion there are three different things treated of in that section of the act. That which is treated of is premises, and there are three kinds of premises which are described. The first kind of premises described is a house; and that word has been held to mean not merely that which is a house in the ordinary sense, but a house both in the ordinary and legal sense; that is to say, it must be a house in the ordinary sense, but it may include more than a house in the ordinary sense, namely, that which is also a house in the legal sense, that is, the house and the curtilage and garden, and all that is necessary to the enjoyment of the house. The second thing which is described in that section seems to me that which is not in the ordinary sense a house, but a building which is in the nature of a house, although in ordinary language it would not be called a house. The third thing which is mentioned in the section is a manufactory, which may be a house, or may be a building, but which may be something more; that is to say, it may be more than one house, or more than one building, or it may consist of neither house nor building, but only of land used for a purpose of manufacturing. No part of that section is to diminish any other part. Each thing described is different from the others, and it is not circumscribed by the description of any of the others.

Now that being so, the question is raised whether the premises which were to be dealt with here were one house or one building, or whether they were one manufactory. I 435] cannot help feeling *that the period of time to which alone you must look is the moment before the notice to treat is given; and what you have to consider in all these cases is the state or nature of the premises to be dealt with at that moment, and that it does not signify when or how that state of the premises was brought about.

Now to consider, first, whether these premises were one house. It seems to me that the question under this act of Parliament as to whether the premises were a house or not is partly structural and partly one of user. You must have the premises so structurally made or placed that they may be one house, that is, one house in that large sense to which I have adverted; and secondly, you must have them enjoyed as one house, or held as one house. Now here, looking at the building, a model of which has been shown us, by reason of the internal communication and by reason of the circumscribed ambit, it seems to me that structurally it is capable of being considered one house. You could have internal communication with every part, and they are so circumscribed within one ambit that you may say they are within one curtilage.

But then arises the question whether they were enjoyed as one house. Now, putting aside the question of manufactory, taking it as if they were used for business, how were they used? There is but one occupier of the premises. The premises are used for the purpose of business. The way in which they were used for the purpose of business is that the business, whatever it is, is carried on under one management; it is carried on by servants and workmen, who are treated as one body; and although the articles dealt in are different, yet the whole is carried on by one person, as one business. If that be true, the premises are structurally capable of being one house; they are occupied for carrying on a business, as I have said, under one management. I cannot think it makes it the less a house because it is used not as a mere residence but as a business house. If so, I think the company brought themselves within the statute by taking No. 5 and the yard behind it, or either of them, and that they were bound to take the whole house, or to give up what they had taken.

Then I am also of opinion that this is one manufactory; and I think so whether it is one house, or whether you are to consider it as more than one house. I cannot think that the fact of its being one house makes it less of a [436 manufactory if it is used for the purpose of a manufacture. I do not think that this is the meaning of the act of Parliament. It may be a house and a manufactory; it may be one manufactory although it is not one house. The question then is, first, whether it is a manufactory; and secondly, whether it is one manufactory.

Now, looking at the mode in which these premises are used, I think it is impossible for any one to say that such

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premises can be required for selling purposes only. The extent of the premises and the mode in which the different parts of them are used make it clear to me that it is not reasonable to say that the main use of these premises was for selling purposes. I consider that the main use of these premises was for manufacturing purposes; and if that be so, although selling was carried on on the premises, still I think that as the main use was for manufacturing purposes, it is proper to call them manufacturing premises. At all events, as a question of fact, the Vice-Chancellor, the judge who tried this case in the first instance, came to the conclusion, as a matter of fact, that these premises were manufacturing premises; and upon such a question of fact I apprehend this court, as a court of error, ought not to overrule the decision unless we can satisfy ourselves that it was wrong. And, so far from being satisfied that it was wrong, I am myself strongly of opinion that it was right as matter of fact.

Then comes the question whether it was one manufactory. Here again we have the fact that the business is carried on by one person under one management by servants who are treated as one body, and therefore, unless there is something to prevent these premises from being one manufactory, it seems to me that they must be treated as one manufactory. Now, what is relied upon is this: It is said that different processes of different manufacture, producing different results, are carried on. That is true, but it seems to me that, where the whole business is carried on by one person under one body of servants and with one capital, the mere fact of different articles being manufactured on the premises produced by different processes does not make those manufacturing premises two sets of manufacturing premises, but leaves them one.

Therefore, I think that whether you consider this as a 437] house or *whether you consider it as a manufactory—it is both—but in either case it is one and single. It is one set of premises, and used for one purpose, and therefore it is one house and it is also one manufactory. In either case, I think that either No. 5 or the yard brought the company within the statute. I think, therefore, that this judgment ought to be affirmed.

COTTON, L.J.: The question we have to consider is this, whether or no the defendants, by the notice they gave, were proposing to take a part or fraction of one of those units which are protected by the 92d section. Now there are three words used—"part only of any house or other build-

ing or manufactory." In my opinion those must be considered as three things, that is to say, there may be a manufactory which is not a building, there may be a building which could not properly be described as a house, and a house includes more than mere building, and I am of opinion that although a house or other building is read together in this sense, that a house involves the notion of building, yet that a manufactory does not involve necessarily the idea of building. Manufactory is put in there, in my opinion, to provide for the case of a manufactory being carried on on premises where there was no house or building, but yet it is a manufactory in the sense of its being premises appropriate for the carrying on of what may be called a manufacture, and is a manufactory in that sense. Then "building" and "house" I also look upon as distinct in this way, that there may be a building which could not be said either in the legal sense or in the ordinary sense to be a house, and that therefore that word was added as something different from that in order to include something not necessarily included in this word "house."

I do not intend to give an opinion on the question whether or no what the defendants propose to take by their notice to treat was part of a manufactory. I do not consider it necessary to give an opinion on that question, because, in my opinion, what they were proposing to take was part of a house. We are not construing this section now for the first time. We have had plenty of authority as to what the meaning of "house" is, and although I do not at all think that we ought to construe this liberally to *favor the [438 landowner, yet we ought to construe it reasonably and fairly, having regard, of course, to previous decisions, and having regard to this, that the object and intention of this section was evidently to give a certain protection to landowners, to persons whose property was taken away from them against their will, so that no person should be required to sell a fraction only of that which ought to be regarded as a unit, when he might be very materially prejudiced by having left on his hands certain fractions only of that unit, not capable of being used efficiently when one fraction had been taken away from it. What we have to do is to construe the section fairly, and see whether or no in the present case that which the company are proposing to take is or is not a part of one of these units described in this act of Parliament. I should mention here that one must not really be nice to see whether or no proper notices have been in terms given; it is quite sufficient, in my opinion, if, when the company

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have proposed to take a bit of land, the landowner has given them notice that he is able and willing to sell, and desires them to take the whole of a certain defined property. Whether or no he describes it inaccurately as a manufactory when he ought to have described it as a house, or as a building when it ought to be described as a house, or *vice versa*, is, in my opinion, immaterial. I mention that, because in the present case the argument at first was simply directed to the question of whether or no this was a manufactory, and the notice given by the landowner, the plaintiff, no doubt pointed specifically to a manufactory and not to what, in my opinion, was the proper description of this, a house.

With regard to the word "house," it is impossible to say it is to be confined to a building used wholly, or almost wholly, for residential purposes. In fact it was conceded by Mr. Dickinson, and it could not be well disputed, that "house" would include business premises, and, in my opinion, that is perfectly correct, although possibly it might be said that "house" points primarily to a residence. Yet it is impossible, especially after the decided cases, to say that a "house" is confined to that of which the primary object is residential. I refer to a case which was so often quoted in the argument, that of St Thomas' Hospital. No doubt persons did reside there, and the persons, while they were *being treated there for diseases or for accidents under which they were suffering, did some of them live there. Yet it is impossible to say that it was a residential house, but it was held to be a house within the fair meaning of this act of Parliament. That the word "house" is not to be confined to something used for residential purposes is very apparent from what was said by Lord Hatherley, when Vice-Chancellor Wood, that you could not possibly take the theatre of the hospital and then say you were not taking part of the house. If you were to confine that which is part of the house within the meaning of this section to that which, although not structurally part of the building was required for the residential purpose, it is impossible to say that the theatre of the hospital could be in any way connected with residential purposes, although persons did reside in the hospital, or with the residence of the persons who were so treated. If we arrive at this, that a hospital is, within the fair meaning of the act of Parliament, a "house" within this section, then everything which is an adjunct to the hospital for the purpose for which a house *quod* hospital is used is a part of the house.

Now, I think that is not unimportant in the present case, for this reason. What we have to consider is, whether or no these premises are one house. I quite agree with what Lord Justice Brett has said, that the word includes what in ordinary parlance is considered a house, and includes everything which in law would pass by the conveyance of a house or messuage. Now, look at this, and see whether it does not come within the ordinary sense of a house, certainly within the legal sense of a house. Here we have a large block of building; it is connected throughout by internal communications, that is to say, there are certain yards included within the ambit of these premises; there are doors opening into these yards, by which you can communicate from the front to the back of these premises without going into any public thoroughfare. Then we have what was originally a separate cottage in Bethesda Row, but there has been an internal communication made through that house into Bethesda Row, and that is used as a means of access, and may be called a back door to the rest of the premises for bringing in and taking out sacks full and empty, and for persons to go in and come out. Then there *is [440 another communication on the other side towards Bethesda Street, and there is on that side of the premises a yard, which is used, for purposes connected with the business carried on in the adjoining buildings. The question, to my mind, is not that of the particular use to which these premises are being applied. I entirely disregard the question as to whether or no the particular use is such that they are a "manufactory" in consequence of that use. Here we have a building with continuity, if not unity, of structure; we have it in common occupation, that is to say, all in the occupation of the plaintiff by himself and his servants in carrying on the business, of which we may say the front is the property in High Street, where there is the shop, the place where he sells what he makes and buys for the purpose of selling. If you disregard entirely the question of manufactory, I think few persons would hesitate to say that the whole of the block is a house having entrances in High Street and in Bethesda Row. Moreover, that will be part of a house within the meaning of this act of Parliament which would pass by a conveyance of the house, although not part of the structure at all, being part of the curtilage or land, or yard, connected with the house in such a way that it would pass within the description of a house.

Then, does this cease, either in legal language or in ordinary language, to be the one unit, a house, because different

parts of it are used for the purpose of manufacture, or for the purpose of different manufactures? In my opinion it does not. Taking what I will assume to be, independently of its user, a house, whether or no the whole of the user is for the purpose of the owner of the house, for the purpose of the business carried on by him in his house, can that possibly prevent these premises from still being a house within the meaning of this section? In my opinion it cannot.

Then we come to this, that by the notice which the defendants, the Tramway Company, have given, they propose to take that part of this block, which is in fact the back door, that is to say, the old cottage No. 5, which has by the alteration in structure been made capable of being part of the house, and which is actually used as a part of the house. They have also taken what, in my opinion, is part of the house in legal language, if it would not be in ordinary language, although I do not at all say it would not *be, namely, that yard which lies on one side of these premises. That being so, I am of opinion that they have taken part of that unit, the house, and under the 92d section they cannot take that alone if the owner desires them to take the entirety, and is able and willing to convey to them the entirety, which the plaintiff professes to be.

In my opinion, therefore, the decision was right, and in this case the plaintiff is entitled to protect himself from the act of the defendants, and to prevent them from taking part without taking the entirety of the block, which he has sufficiently described by his notice and by his writ.

Solicitors for plaintiff: *Bell, Brodrick & Gray*, agents for Smith, Lewis & Jones, Swansea.

Solicitor for defendants: *Walter Webb*.

[9 Chancery Division, 441.]

V.C.M., Feb. 5, 6, 7, 14, 19, 20, 1877. C.A., June 23, 1878.

DOUCET V. GEOGHEGAN.

[1875 D. 15a.]

Domicil—Change of Original Domicil—Permanence of Residence—Declarations of Intention.

The testator in the suit was a Frenchman, but had lived twenty-seven years in England, during the greater part of which time he was a partner in an English house of business, paying occasional visits to France. He married successively, in English churches, two wives, who were Englishwomen and Protestants, though himself a Roman Catholic, and his children were brought up in England as Protestants. He made his will in the English form, and left his property in a manner inconsistent

with French law. Upon an action to establish a French domicil, numerous witnesses deposed that he had made various parol declarations that he intended to return to France when he made his fortune. It was also proved that he always refused to be naturalized in England, and would not take a lease of more than three years of his house :

Held (affirming the decision of Malins, V.C.), that the acts of the testator manifested an intention to acquire an English domicil; and that his declarations of intention to return to France when he had made his fortune were not sufficient to rebut the conclusion to be derived from the facts of his life, especially of his English marriages.

THIS action was brought by Adèle Doucet, the widow of the testator, François Eugène Doucet, against William Joseph Geoghegan, *the executor of his will, and Michael [442 John Geoghegan, the testamentary guardian. The testator was by birth a Frenchman, but lived and carried on business for many years before his death in England. His will was made in England, and was dated the 25th of November, 1872, and thereby he appointed William Joseph Geoghegan and Frederick Allen executors and trustees; and after bequeathing certain pecuniary and specific legacies, he gave and bequeathed to his trustees all his capital invested in the business theretofore carried on by him, and all his share and interest in the same business, and all the rest of his property, upon trust for sale and conversion, and to stand possessed of the proceeds upon trust as to one moiety for his children as therein mentioned, and as to the other moiety upon trust to pay the annual produce thereof to the plaintiff during her widowhood, and after her decease or re-marriage, which should first happen, upon trust for his children in the same manner as thereinbefore directed with respect to the other moiety. And in the event of there being no child who should attain a vested interest, in trust for the plaintiff for life, and after her death upon trust for his sister Clemence, the wife of Auguste Duclerc; and the will contained powers of advancement and maintenance for the benefit of the children during minority. And after expressing a desire that his children should be brought up in the Roman Catholic faith, he with that object nominated and appointed the above-named defendant, Michael John Geoghegan, a Roman Catholic, guardian of his children during minority, and requested and empowered him to take upon himself all the necessary duties of the guardianship for the purpose aforesaid. The testator left the plaintiff, his widow, and three children by her, him surviving; all of whom were infants. Frederick Allen renounced and disclaimed the executorship and trusteeship of the will, and the same was proved on the 8th day of January, 1875, by the defendant W. J. Geoghegan alone.

The plaintiff contended that F. E. Doucet was a domiciled

Frenchman, and that the validity of the will, the administration of his estate, the rights of the plaintiff and her children in that estate, and the right of the plaintiff to the guardianship of her children, were respectively governed by the law of France; by which the plaintiff, as the widow 443] of a Frenchman, was entitled *to one moiety of the real and personal estate of which he died possessed unfettered by any trust, and his children were in like manner entitled to the other moiety. By the same law the plaintiff as such widow was entitled to the guardianship and education and bringing up of her children by her deceased husband, free from the control of the defendants, or either of them, or of any third person. There were several other particulars in which the will was inconsistent with the law of France.

The plaintiff claimed that it might be declared that the estate of F. E. Doucet ought to be administered according to the law of France; and that his will was null and void so far as it was in any particular in contravention to the law of France relating to the wills of Frenchmen.

The facts proved in the case, and which were common to both sides, were as follows: The testator was by birth a Frenchman, and was born in 1820. He resided in France till he was twenty-seven years of age. His father was a shirtmaker in Paris, and he was brought up with a knowledge of that business. For seven years he was in the French army. In the year 1847 he came to England and became assistant in a hosier's shop. In 1851 he entered into partnership in the hosiery business with a Mr. Barlow, the partnership deed being drawn in the French language, and with the sanction of his father. On the 17th of September, 1852, he married his first wife, an English lady, who died on the 3d of October, 1853. She was of the Protestant religion, and the marriage took place in an English church, according to the Protestant form, and the testator, who was brought up in the Catholic religion, always allowed her, without any interference on his part, to practise her own religion. On the 1st of September, 1853, just before the death of his first wife, he entered into partnership with the defendant, W. J. Geoghegan, as hosiers, and the business was*carried on in Regent Street, under the style of "Geoghegan & Doucet." At the expiration of ten years, that is, in 1863, this partnership was renewed for ten years longer.

On the 5th of January, 1866, the testator married, in an English church, his second wife, the plaintiff, who was also a Protestant, her father being French and her mother Eng-

lish. The testator did not on the occasion of this or of his former marriage conform *to the formalities which [444 are required by the French law for the legalization of marriages of Frenchmen in a foreign country. During the whole period of the marriage the plaintiff continued in the Protestant religion, and was a regular attendant at the established church.

There was no child of either marriage until 1861, when a son was born, and upon that occasion the plaintiff, at the urgent request of the testator, and in order to please his father and mother, allowed the son to be baptized in the Catholic form, but from that time to the death of the testator the son was brought up as a Protestant, and regularly attended a Protestant church with his mother. There were two other children born subsequently, both being girls, who were baptized in the Protestant form, and were brought up in the Protestant religion. No objection was raised by the testator during his life to any of his children being educated as Protestants, and he himself only attended a Catholic church upon one occasion during the period of his residence in England.

In the year 1869, the house of Geoghegan & Doucet established a branch business in Paris, which lasted till the year 1874.

In the year 1870, the partnership between the testator and William Geoghegan having then three years to run, was renewed for another period of ten years. The testator's share of the profits amounted, during the latter years of the partnership, to about £1,500 per annum. Of this sum he drew out about half for his personal expenses, and the remainder was allowed to remain as part of the capital of the business, so that the capital of the testator at the time of his death amounted to nearly £8,000. When the testator first married the plaintiff, they lived over the business premises in Regent Street, they afterwards removed into lodgings in Bentinck Street, where they resided between eleven and twelve years, and then the testator took a lease for three years of a house in Albion Road, St. John's Wood, in which he lived until his death, which took place on the 17th of June, 1874.

The evidence of the witnesses, who were examined in court, in support of the plaintiff's case, and in favor of a French domicile, was to the following effect: The plaintiff, Madame Doucet, deposed that the testator always and continuously expressed an intention of *returning to [445 live in France when he had made sufficient money to enable him to do so. He refused to purchase a house or to take a

longer lease than three years, because it would interfere with his returning to France. He always desired to improve the branch business in Paris, which would enable him to live there, and to establish his son in that business. After being taken ill, he was still more anxious to return to France, because he thought his native air would improve his health. He said in confidence that he should not tell the Geoghegans that he intended returning to France. He went to Paris two or three times a year, and remained there two, three, and four weeks at a time. The plaintiff usually went with him once every year. He was always fond of France, and used to point out to her the advantages of living there. He refused to be naturalized in England, and often spoke of the advantage he derived in being a Frenchman, as it exempted him from serving on juries. Before her marriage the testator promised her in the presence of her father and mother that all her children should be brought up in the Protestant religion, and it was in consideration of that promise that she married him. The eldest son was baptized by a Catholic priest to please the testator's father and mother, and at his urgent request, but from that time he never interfered with the religion of the children, and all three were brought up as Protestants, and the elder children went to church with her. In 1857 the testator had made a will by which he gave her everything, but in 1872 she urged him to make a new will. He said in answer to this that it was unnecessary, since the French law provided for the distribution of property. He afterwards altered his mind, and promised to make another will when he next went to France. The present will she had never heard of till after his death.

Several other witnesses deposed to the fact that the testator had frequently in the strongest terms expressed his intention of returning to France and permanently settling there, when he had made sufficient money to enable him to do so, and that these expressions of his intentions continued up to the last day of his life.

Some of these witnesses said that he had expressed a wish to take a house on the River Marne, near the place of his birth, where he could enjoy his favorite amusements of boat-
446] ing, fishing, *and sketching, and that the testator was proud of his country and of being a Frenchman, and was prepared during the war between France and Germany to join the army of France if called upon.

On behalf of the defence, and in favor of an English domicile, one witness said the testator many years ago expressed his intention of returning to live in France after he had

"spoiled the Egyptians," but since then he had said nothing either way about his return. The defendant W. J. Geoghegan, the partner of the testator, said his impression was that M. Doucet in the first years of his residence in England had a vague idea of returning to France, but in the later years he never referred to leaving England, but said England was his home, and he refused to accept the witness's proposal that he should remain half the year in Paris for the sake of improving the Paris business, because he said that since his father and mother's death he had no interest in living in France, and that he should not like to return and no longer find his father's house open to him. He was always glad to get home after two or three weeks' stay in Paris, and seemed much more settled after he took his house in St. John's Wood, which he was particularly fond of, he used to call his paradise, and had laid out about £800 in the repairs of that house.

The evidence of the mother of the testator's first wife, and of M. J. Geoghegan, the solicitor who prepared his will, was also strongly against the testator having had any intention of returning to France.

The action came on for hearing before Vice-Chancellor Malins on the 5th of February, 1877.

J. Pearson, Q.C., Dr. Tristram, and Cottrell, for the plaintiff: The domicile of the testator was originally French, and a person always retains his domicile of origin until he does something to show that he intends to throw off that domicile and acquire a new one. To decide whether a man has changed his domicile, you must take facts as well as intention. You may from some circumstances infer an intention to change the domicile of origin, but you may rebut any such inference by showing it was not the intention of the person to acquire a domicile in the country he is inhabiting: as for instance, if a man is here because he has *any particular occupation in the country, or is here for the purpose of trade, without any intention of making this his permanent abode. On the subject of intention there is the case of *Douglas v. Douglas* (¹), in which Vice-Chancellor Wickens explained his view of the law in this way: "What, therefore, has to be here considered is whether the testator ever actually declared a final and deliberate intention of settling in England, or whether his conduct and declarations led to the belief that he would have declared such an intention if the necessity of making his election between the countries had arisen." The evidence in that case was stronger than in

(¹) Law Rep., 12 Eq., 617, 645.

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this case to show that the testator, whose domicile of origin was Scotch, had changed his domicile, but the Vice-Chancellor said that no intention had been expressed to that effect, and decided in favor of a Scotch domicile. Here there is no evidence to show that the testator intended to resign his French domicile and to acquire a domicile in England. And the rule, as expressed in *Price v. Dewhurst*(¹), is that the law of the place of domicile is to regulate the decision of what was the last will and what are the rights under it.

Before a new domicile can be acquired there must be some act to show that the old domicile was relinquished; that was expressed in *Udny v. Udny*(²). It requires a very strong case to make a man lose his domicile of origin. Change of residence, however long and continued, will not be sufficient to effect a change of domicile as regulating the testamentary acts of an individual without an express intention to take a new domicile. The case of *Moorhouse v. Lord*(³) lays down that rule very forcibly. In order to lose a domicile of origin and to acquire a new domicile a man must intend *quatenus in illo exuere patriam*. It is not enough for him to take a house in the new country, even with the probability and the belief that he may remain there all the days of his life, but he must intend to cease to be a Frenchman, and to become an Englishman. This was followed in *King v. Foxwell*(⁴), where the Master of the Rolls said that a permanent domicile could not be decided by mere length of time, but it 448] involved the intention of *the person. Even the purchase of a place of residence in England would not be conclusive: *Hodgson v. De Beauchesne*(⁵).

It was laid down in *Jopp v. Wood*(⁶), affirmed on appeal(⁷), that a domicile can only be changed *animo et facto*, and residence alone, although decisive as to the *factum*, is an equivocal act as to the *animus*. The acquisition of a new domicile involves the abandonment of the previous domicile, and to effect the change the *animus* of abandonment must be shown. A man going abroad for the purpose of trade and to obtain a fortune, does not by a residence abroad intend to acquire a foreign domicile. You cannot take away a man's right to his domicile of origin unless there is an express intention to part with it. In this case there is the strongest evidence of an intention to return to France and live there permanently. We are not to assume, because

(¹) 4 My. & Cr., 76, 84.

(²) Law Rep., 1 H. L., Sc., 441.

(³) 10 H. L. C., 272.

(⁴) 3 Ch. D., 518; 18 Eng. R., 644.

(⁵) 12 Moo. P. C., 285.

(⁶) 34 Beav., 88.

(⁷) 4 D. J. & S., 616.

a man marries an Englishwoman when he comes here for the purpose of trade, that on that account he intends to live for the rest of his life in England; nor can we say that because he has children by his wife, that therefore he meant to be an Englishman. This lady, however, was not English, for her father was a Frenchman and she was born in Italy.

From the evidence before the court there is but one intention shown, viz., that he intended to return and live in France when he had made money enough to enable him to do so. He came here for trading purposes. He never took a step in England to fix himself to the soil. He would only take a short lease of his house, in order that it should not interfere with his return to his native country.

We have also eighteen witnesses who have been examined, all of whom state positively that the testator frequently and upon all occasions spoke of his intention to return and live in France, and these expressions were continued down to the day of his death. And against this long list of witnesses there are only two on the other side, namely, the two Geoghegans, who give evidence in contradiction to ours. The provisions of the will are very unjust towards the plaintiff, and are inconsistent with the previous acts and promises of the testator. It is almost impossible to believe that it expresses his real intentions.

**Glasse*, Q.C., and *F. G. Bagshawe*, for William [449 J. Geoghegan: The cases cited in support of a French domicile are very different in their circumstances from the present case. To show that a man intends to change his domicile, one fact is worth a dozen expressions of intention such as we have from the witnesses on behalf of the plaintiff, who only repeat the observations of a man who spoke what he might for the moment be thinking of. But what are the facts? The testator had married two wives in England, both English and both Protestants; he had children brought up in English habits, and also educated in the Protestant religion. He had a lucrative business: he had entered into partnership on three occasions with William Geoghegan, and each time for ten years. He had settled himself in a house in which he was thoroughly happy and contented, and on which he had expended a large sum of money. In contradiction of the plaintiff's evidence as to expressions of intention, we have the evidence of the two Geoghegans that he meant to make England his home.

As to authorities, the case of *Drevon v. Drevon* (1) is stronger than any other, and is singularly like the present

(1) 34 L. J. (Ch.), 129.

case in all its circumstances. Then in *Haldane v. Eckford* (*) it was laid down that, in order to effect a change of domicile, it is not necessary that a man should do all in his power to divest himself of his original nationality, *exuere patriam*, it being sufficient that there should be a change of residence of a permanent character voluntarily assumed; and though a residence may be originally temporary, so soon as a change of purpose or *animus manendi* can be inferred, the fact of domicile is established.

The facts in *Stevenson v. Masson* (†) were not nearly as strong in favor of an English domicile as in this case, but the domicile in this country was established; and in *Brunel v. Brunel* (‡) it was held that a French subject, by establishing himself in business in this country, marrying, and continuing to reside here for more than thirty years, making only occasional visits to France, had established an English domicile, and there the testator had refused to take out letters of naturalization in this country, on the ground that he 450] *might return to France, and would not give up his *status* as a French citizen.

Higgins, Q.C., and *Pace*, for Michael J. Geoghegan, supported the same view. They referred to *Hamilton v. Dallas* (†); *Andrews v. Salt* (‡); *Aitchison v. Dixon* (‡); *Round on Domicil*, where the leading cases are collected.

J. Pearson, in reply.

MALINS, V.C.: This case is one which involves consequences of the utmost importance and public interest. It has now occupied the court for five days in argument and in hearing evidence. The great length of time it has already occupied, and the smallness of the stake at issue, make it desirable that the case should be terminated without further delay, and I therefore intend to deliver judgment at once. I may observe that while the arguments have been going on I have again and again considered all the evidence and read all the authorities which have been cited, consequently there would be no advantage gained by delaying my judgment.

The object of the suit is to have it declared that the testator, François Eugène Doucet, was at the time of making his will a domiciled Frenchman. That he had resided, for many years in this country is the common case on both sides; but it is said he never threw off his intention of

(†) Law Rep., 8 Eq., 681.

(*) 1 Ch. D., 257; 15 Eng. Rep., 724.

(‡) Law Rep., 17 Eq., 78; 7 Eng. Rep., 692.

(†) Law Rep., 8 Ch., 622; 6 Eng. R., 536.

(‡) Law Rep., 12 Eq., 298.

(*) Law Rep., 10 Eq., 589.

remaining a Frenchman, and had always an *animus reverendi*, and therefore that the estate must be administered according to the law of France. The testator's widow is the plaintiff, and she claims that the will ought to be administered according to the law of France, and that it may be declared void so far as it is in contravention of that.

Now in order to determine the question of domicil of the testator, the circumstances connected with his coming to this country and remaining here must be considered. [His Lordship then referred to and commented at some length on the evidence adduced on both sides, and continued :]

I think it may be taken upon this evidence that the testator did *say to many persons throughout his life [45] that it was his desire and intention to return to France. On that subject it may be said that it is the constant habit of some persons to say they will do certain things when they have money enough for the purpose. No doubt he made these statements repeatedly, but is there enough to counteract the fact of his being settled in England, where his business was, and where he hoped at a future time to settle his son in business? These were strong reasons for his remaining here. He was evidently an impulsive man, and might have said he would return to France, when, in fact, he had no intention of ever doing so.

Under these circumstances I shall apply the rule which was laid down in *Hodgson v. De Beauchesne* (¹), where it was said that mere residence for a length of time was not sufficient to constitute a domicil, but it involved the intention of the person to remain.

Now, if I take all these witnesses together to prove his intention to return, I must also look at the evidence on the other side, which was given by two persons who were the most likely to know his real intentions; these persons were the two Geoghegans. Mr. William Geoghegan was his partner, in whom he placed unbounded confidence, and whom he appointed his executor. He was a person who was likely to know what his real intentions were, and his evidence is, to my mind, conclusive. I assume that up to 1866, when his mother was alive, and even up to the time when the family residence was disposed of, there was a strong intention on his part to return to France. But what do the defendants say? [His Lordship commented upon their evidence.]

Now, therefore, if I take the evidence on both sides, I have the last and most emphatic declaration of M. Doucet

(¹) 12 Moo. P. C., 285.

that England was his home, and here he was content to remain. Therefore I come to the conclusion that he had finally abandoned the intention of returning to France, and made up his mind that this country was to be the country of his adoption, and that it was his intention, for the purpose of disposing of his property, to become an Englishman.

With regard to the cases which have been cited, the case 452] which *has the closest application to this is *Drevon v. Drevon* ⁽¹⁾. Some of the facts there are stronger in favor of a French domicile than in the present case, and some of the facts are stronger in favor of an English domicile than here, but the observations of Vice-Chancellor Kindersley ⁽²⁾ are very decisive: "There is in this case, as there generally is in cases on questions of domicile, evidence on both sides with regard to expressions, intention and declarations of intention on the part of the testator, evidence of his saying he meant some day or other to go back to France, and, on the other hand, evidence of his saying he meant to remain all his life in England, and so on. I think there is no doubt that, upon the cases, the courts naturally are disposed to give less weight to that sort of declaration than to the acts of the testator."

Vice-Chancellor Kindersley then reviewed all the facts and evidence in that case, and came to the conclusion that the domicile of the testator was English, notwithstanding the evidence of frequent declarations made by him that he intended, some time or other, to return to France. The circumstances in that case were very similar to those in this case, and upon the whole I agree entirely with the decision of the Vice-Chancellor.

Then, with regard to the other cases, there are two or three decided by Vice-Chancellor Bacon; the first is *Brunel v. Brunel* ⁽³⁾. There there was a residence of thirty years; here there are twenty-seven years. There the testator stated distinctly that he would not give up or surrender his citizenship of Paris; that he was a Frenchman and might return to reside in France, and that he consequently declined to become a naturalized British subject. But nevertheless the Vice-Chancellor decided in favor of an English domicile, on the ground of his permanent residence in this country for so many years.

The circumstances in the case of *Douglas v. Douglas* ⁽⁴⁾ were so different from these that I do not feel myself pressed

⁽¹⁾ 34 L. J. (Ch.), 129.

⁽²⁾ *Ibid*, 131.

⁽³⁾ Law Rep., 12 Eq., 298.

⁽⁴⁾ Law Rep., 12 Eq., 617, 645.

in any manner by it. As to *Udny v. Udny* (*), it appears to me that all I am now deciding is in strict accordance with that case.

Jopp v. Wood (*) is a case relating to an Indian domicil, which *is quite different from all other cases of dom- [453] icil, because it is well known that every one who goes to India does so for the express purpose of making money and returning to this country as soon as possible. In *Haldane v. Eckford* (*) it was held to be sufficient that the testator had a residence of a permanent character voluntarily assumed, and that a residence originally temporary and intended for a limited period might afterwards become general and unlimited, and as soon as the *animus manendi* could be inferred, the fact of domicil was established.

Stevenson v. Masson (*) is another case in which an English domicil was established in the case of a man who had given up a Canadian domicil and had come over to this country, and had purchased the lease of a house in St. John's Wood in the year 1868, where he lived till the time of his death, in 1871; and in *King v. Foxwell* (*) it was held that in order to change the domicil of origin it was sufficient for a man voluntarily to fix his sole or principal residence in a foreign country with the intention of residing there for a period not limited as to time.

Now, therefore, whether I look at the evidence or at the whole history of the testator's life, I think that for the purpose of disposing of his property he must be considered as domiciled in this country. It would be monstrous that a man who had made his fortune here, and lived here for so many years, should be so helpless as to be obliged to allow his property to be disposed of according to the French law. The suit, therefore, naturally fails; and as Mr. Glasse does not press for costs, all I have to do is to direct that the estate of the testator is to be administered according to the law of England.

As to costs, the plaintiff will not have any costs up to the hearing; but as this is an administration suit, the rest of the costs will be costs in the cause. In conclusion, I must express my regret that Mr. Michael Geoghegan should ever have made such a will as this; at the same time I think, considering the small amount of property involved, this suit ought never to have been instituted.

(1) Law Rep., 1 H. L., Sc., 441.

(4) Law Rep., 17 Eq., 78.

(2) 4 D. J. & S., 616.

(5) 3 Ch. D., 518.

(3) Law Rep., 8 Eq., 631.

From this decision the plaintiff appealed. The appeal was heard on the 28th of June, 1878.

454] **J. Pearson, Q.C., Dr. Tristram, and Cottrell*, for the appellant, cited *King v. Foxwell* ⁽¹⁾; *Udny v. Udny* ⁽²⁾; *Haldane v. Eckford* ⁽³⁾; *Aitcheson v. Dixon* ⁽⁴⁾; *Moorhouse v. Lord* ⁽⁵⁾; *Jopp v. Wood* ⁽⁶⁾.

Glasse, Q.C., and F. G. Bagshawe, for the executor, and *Higgins, Q.C., and Pace*, for M. J. Geoghegan, were not called on.

JESSEL, M.R.: The principal question in this case is, what was the domicile of the testator? For one thing is quite clear, that if his domicile was not English his will cannot take effect. I will state shortly the undisputed facts of the case. The testator, who was born in France, when young, in the year 1844, came to England, and in fact resided in England till his death. He was first a shopman in the hosiery business till 1851, and then went into partnership with a person named Barlow. The partnership articles were executed in Paris, and the partnership was regulated by French law, but he returned to England and carried on business in partnership with Barlow in London, and married an English Protestant lady, he being himself a Catholic. We have here these facts, that he was resident in England, that his business was carried on in England, and that he had married a wife in England. There is no evidence at this time of any intention on his part to return to France. I should have said that without doubt he had at that time acquired an English domicile. In 1853 he dissolved his partnership with Barlow, and entered into partnership with Geoghegan. The articles of partnership were English, and there was nothing at this time to disturb his interest in England. His wife died, and in 1856 he married again. His second wife was also an Englishwoman and a Protestant. He married her in England in a Protestant church, and there is no evidence that he took any of those steps which were necessary to perfect the marriage according to the French law, except that a certificate of his second marriage was obtained from the French consul. He *had three children by this marriage: and the year before the first child was born he made a will in the English language, leaving all his property to his wife. He must have known that as he had children, this will would not be valid according to French law. There was some difficulty about the baptism

⁽¹⁾ 3 Ch. D., 518; 18 Eng. R., 644.

⁽²⁾ Law Rep., 1 H. L., Sc., 441.

⁽³⁾ Law Rep., 8 Eq., 631.

⁽⁴⁾ Law Rep., 10 Eq., 589.

⁽⁵⁾ 10 H. L. C., 272.

⁽⁶⁾ 4 D. J. & S., 616.

of his eldest child, but the children were brought up in the Protestant faith; his home, his business, his property, his wife and children, were all in England. The firm to which he belonged did not conduct its business in France itself, but employed an agent in Paris; the testator occasionally went to Paris to see his relations, but beyond that he had no connection with France. In 1872 he made the will which is now in dispute; it is certainly a remarkable one for a Frenchman to make. He describes himself as of St. John's Wood and of Regent Street; he avails himself of the provisions of the English law; he appoints a testamentary guardian to his children, and he disposes of his property, notwithstanding the existence of children, in a way which every Frenchman knows is repugnant to French law. Against this evidence there is nothing except the testimony of some witnesses that he made some declarations in casual conversations of an intention to return to France when he had made money enough, but this evidence is not contradicted by evidence on the other side of declarations that he intended to remain in England. I cannot help thinking it would be dangerous to admit declarations in casual conversations, even if uncontradicted, to outweigh all the acts of a man's life and every document executed by him. For it is important to observe that there is no document which expresses an intention to return to France, while on the other side there are two wills which are inconsistent with such an intention. In *Hodges v. Beauchesne* (¹), Dr. Lushington says, "With respect to verbal declarations made by witnesses who depose thereto, no doubt such declarations are admissible evidence in these questions of domicile; but the weight to be attributed to them entirely depends on circumstances, especially the time which has elapsed since they were made; and the circumstances under which they were made. To entitle such declarations to any weight, the court must be satisfied not only of the veracity of the witnesses who depose to such declarations, *but of the accuracy of their memory, and that the declarations contain a real expression of the intentions of the deceased. Such evidence, though admissible, has been considered by many authorities as the lowest species of evidence, especially when, as in this case, encountered by conflicting declarations." And again (²), "We think that length of residence, according to its time and circumstances, raises the presumption of intention to acquire domicile. The residence may be such, so long and so continuous, as to raise a presump-

(¹) 12 Moo. P. C., 325.

(²) 12 Moo. P. C., 329.

tion nearly, if not quite, amounting to a *præsumptio juris et de jure*; a presumption not to be rebutted by declarations of intention, or otherwise than by actual removal." The contention here is, not that the declarations can be read to show a change back to his original domicile, but to prove that he never intended to acquire a domicile in England. But they are much too indefinite for that purpose. A declaration that a man means to return when he has acquired a fortune is not sufficient to outweigh actions which show an intention of permanent residence.

In all the cases a difficulty arises as to the meaning of the word domicile; but it evidently implies the intention to make the place one's home, and a home is itself suggestive of permanency. It is impossible to lay down an absolute definition of domicile, but in the present case there is every element that makes a home. The testator had no other home or place of residence: he showed by his actions no intention to change his residence. It is true that he only took his house for three or four years, but that is not sufficient to show an intention to change his residence. On the whole, it appears to me that there is nothing to outweigh the natural result of his acts, and that looking at his acts fairly, as a jury ought to do, the court can come to no other conclusion than that his domicile was English. The appeal must therefore be dismissed with costs.

JAMES, L.J.: I am of the same opinion. It is not necessary for me now to express my opinion of the general question of the value to be attached to expressions of intention. I stated my opinion on that *point in *Haldane v. Eckford* ('), and I adhere to the observations which I there made.

With respect to the present case, I hardly remember one in which the domicile of a testator was more conclusively proved. Both his marriages were acts of unmitigated scoundrelism if he was not a domiciled Englishman. He brought up his children in this country; he made his will in this country, professing to exercise testamentary rights which he would not have had if he had not been an Englishman. Then with respect to his declarations, what do they amount to? He is reported to have said, that when he had made his fortune he would go back to France. A man who says that is like a man who expects to reach the horizon, he finds it at last no nearer than it was at the beginning of his journey. Nothing can be imagined more indefinite than such declarations. They cannot outweigh the facts of the testator's life.

(') Law Rep., 8 Eq., 631.

BRETT, L.J.: I am also of the same opinion. The Vice-Chancellor has decided that the testator, although by birth a Frenchman, died an Englishman. The question is, whether we think that, on the facts before him, he was right in that opinion. It is said that to prove a change of domicile it is necessary to show both fact and intention. What is the fact which must be proved? It is that he had *de facto* changed his residence. What, then, was his residence? I think it is satisfactorily proved that he had taken up his residence in this country. Then as to his intention. Had he the intention of residing in England permanently? The definition of permanence is that it is not only for a period, either for a definite time or for a time limited by a condition. It is therefore necessary, in the first place, to determine whether the testator resided in this country as his home. It was proved that he entered into a business and a partnership in England; that he married an Englishwoman, by whom he had children; and that he never expressed an intention that his wife and children should have any other home. Considering the circumstances under which he came to *England, and under which he married, I think it [458 is impossible to say that the Vice-Chancellor was wrong in holding that England was the testator's home. Then, was any period fixed in any way? It has not been seriously urged that the testator meant to return at the end of twenty years, or of any such fixed period. But it was said that he limited the time by reference to the performance of a condition, namely, of his making a fortune. I think such a condition is not sufficient; it ought to be a condition which limits the residence to a definite time; and when the condition refers only to a time as indefinite as it can possibly be, it cannot be said to confine the residence to a definite time. There can be nothing so indefinite as the time at which a man expects to make his fortune. Therefore, as the testator did not fix a date or make any definite condition by which the residence was limited to a definite time, it must be taken that his intention was to make his residence in England permanent. Therefore the other proposition is established by the evidence.

JAMES, L.J.: I wish to add that I am disposed to think that when the testator entered the English church and declared that he knew of no impediment to his lawful marriage, he must be taken to have made a solemn declaration that he had an English domicile.

Solicitors: *T. G. Brewer; M. J. Geoghegan.*

See 24 Eng. Rep., 241 note.

A domicile once acquired is presumed to continue. But this presumption does not prevail when its effect would be to impose upon the party the character of an enemy to his government: *Stoughton v. Peck*, 3 Woods, 404.

Where one has a domicile in one place, and boards most of the time in another, he is a citizen of the place of his domicile: *Union, etc., v. Hersee*, 79 N. Y., 454.

Where a minor, residing with his parents in this country, was sent by them to a foreign country to be educated, and after having there completed a course of study, and before the end of his minority, returned and again resided with his parents here: Held, that by going to a foreign country for such a purpose he did not change his residence, and that the years spent by him in such foreign country were to be computed as years of residence here, in determining whether he was entitled to be admitted as a citizen of the United States: *Matter of Rice*, 7 Daly, 23.

Where a bankrupt has changed his domicile after the bankruptcy, property acquired by him in the new domicile does not pass to the assignee in the old domicile, at all events as against creditors in the new domicile.

Whether the assignee could claim the after-acquired property if there were no creditors in the new domicile? *Quære*.

Where a person leaves his domicile of choice without any intention of returning, his domicile of origin is immediately restored and retained until he acquires a new domicile of choice.

A person who flies a country to avoid being made a bankrupt, does not thereby so change his domicile as to defeat bankruptcy proceedings, but he may change his domicile immediately after he has been made a bankrupt.

The courts of this colony will presume, *prima facie*, that an adjudication of bankruptcy in another colony has been duly made, and the preliminary steps duly taken.

Where money and chattels of an execution debtor are in the hands of a third person, notice of the writ of *fiery facias*, given by the sheriff to the third person, is not a sufficient seizure of the chattels to constitute a levy, though as part of the property of the execution debtor they became bound when the writ came into the sheriff's hands. The money is not affected by the writ or the notice.

S. recovered a judgment against G., who was the tenant of M. M. also recovered a judgment against G. for a debt not inclusive of rent. G. owed M. a considerable sum for rent. Both S. and M. issued execution upon their judgments, S.'s being the first, and the sheriff levied under both writs upon the furniture in the premises rented from M. M. did not distrain or give any formal notice of his claim to the sheriff:

Held, that as S.'s execution was prior to M.'s, M. was entitled to a year's rent in priority to S. out of the proceeds of the levy.

G. was arrested in New Zealand for an offence against the bankruptcy laws of South Australia, and a sum of money found upon him was taken charge of by the police. G. was subsequently discharged on a writ of *habeas corpus*, but the police retained the money, which was claimed by the South Australian assignee. C. recovered a judgment against G. and obtained a garnishee order attaching the moneys in the hands of the police. Held, that the moneys were a proper subject of attachment: *Strike v. Gleich*, 1 Ollivier, Bell & Fitzgerald, Court of App. (New Zealand) Rep., 50.

[9 Chancery Division, 459.]

V.C.M., April 17: C.A., July 17, 1878.

*AMOS V. CHADWICK.

[459]

[1876 A. 108.]

Practice—Consolidation of Actions—Test Action—Abortive Trial—Substitution of another Action as Test Action—Indemnity against Costs—Rules of Court, 1876, Order LI, r. 4.

One of a number of actions brought by different plaintiffs against the same defendants in respect of an alleged misrepresentation in the prospectus of a company, was ordered to be a test action, the trial of which was to bind all the plaintiffs but not to bind the defendants. When the test action came on for trial the plaintiff did not appear, and judgment was given for the defendants:

Held, that, though the order contained no express provision to that effect, the court had power to substitute another of the actions as the test action, and that, as the trial of the original test action had failed to be a real trial of the issue between the plaintiffs and the defendants without any fault of the other plaintiffs, this substitution ought to be made.

In the absence of agreement the plaintiff in an action thus constituted a test action has no right to be indemnified against costs by the other plaintiffs.

THIS action and seventy-seven other actions were commenced in 1876 by different plaintiffs against the same defendants. The defendants had been the promoters of a company called the Blochairn Iron Company, and had issued a prospectus with the view of inducing the public to subscribe for shares. The plaintiffs had all applied for and taken shares, and they claimed damages from the defendants on the ground that the prospectus contained fraudulent misrepresentations by which the plaintiffs had been induced to apply for their shares. On the 23d of February, 1877, upon the application of the plaintiffs in all the actions, and upon the undertaking of the plaintiffs in all the actions respectively that, so far as they were respectively concerned, the action of *Robinson v. Chadwick* (one of the seventy-eight) should be treated as a test action, and should decide their rights in all the other actions respectively as against themselves, but if the defendants in any of the other actions should decline to accept the judgment in *Robinson v. Chadwick* as deciding the other actions, or any of them, then as to any or such of the other actions in which the defendants should decline to accept the judgment in *Robinson v. Chadwick*, *such other actions were to go to trial respectively; and the plaintiffs in *Robinson v. Chadwick* and in *Smith v. Chadwick* (another of the seventy-eight actions) respectively undertaking that those actions respectively should be prosecuted with due diligence, Vice-Chancellor

Malins ordered that the time for the delivery of the statement of claim in the actions respectively, other than *Robinson v. Chadwick* and *Smith v. Chadwick*, should be enlarged until fourteen days after judgment should have been given in *Robinson v. Chadwick* on the trial thereof or until further order (¹). At the time when this order was made the statements of claim in *Robinson v. Chadwick* and *Smith v. Chadwick* had been delivered. On the 19th of March, 1878, *Robinson v. Chadwick* came on for trial before Mr. Justice Fry, to whom it had been transferred. The plaintiff then asked that the trial might be postponed for a month, on the ground that he was not in a fit state of health to be examined in court. It also appeared that he had requested the plaintiffs in the other actions to give him an indemnity against costs, and that they had declined to do so. The judge refused to allow the trial to be postponed, and the plaintiff then declined to proceed with his case. The judge thereupon dismissed the action with costs (²). The plaintiffs in the other actions then applied to Vice-Chancellor Malins to vary the order of the 23d of February, 1877, by substituting *Smith v. Chadwick* as the test action in place of *Robinson v. Chadwick*. The application was heard on the 17th of April, 1878.

Glasse, Q.C., and Romer, for the plaintiffs.

J. Pearson, Q.C., and Russell Roberts, for the defendants.

MALINS, V.C.: The result of what has taken place is that Mr. Robinson's action has never been tried. He, who had been selected as the representative of seventy-seven other persons, has thought fit, ignominiously, I may say, to retreat from the contest. It may well be, for aught I know, in a case like this, that the selected plaintiff may be bought 461] off by the defendants. Suppose a defendant *in a similar case to this were to go to the selected plaintiff and say, "You have £500 embarked in this case; it is a terrible thing for us to go on with the action; don't say anything about it, but here is double the amount you can ever recover in the action, and your costs," and then the plaintiff settles. Is he to bind the seventy-seven plaintiffs in the other actions by such a proceeding as that? When I ordered that Robinson's action should be the test action, what was my meaning? That it should be fought out to the last, and should produce the judgment of the court upon the evidence. Has it had that effect? Could Mr. Justice Fry have expressed any opinion on the merits of the case? He never had the opportunity, because Mr. Robinson, who ought to have

(¹) 4 Ch. D., 869.

(²) 7 Ch. D., 878.

elicited that opinion, withdrew from the case. If he did not desire to proceed on his own account, he ought to have said to the seventy-seven other plaintiffs, "I do not want to raise this question, I am in very bad health. I am a tradesman, and I want to attend to my business. I have been selected as your representative, but I would rather have nothing more to do with it. Take it off my hands, and indemnify me against costs." The persons whose representative he was would have said, "Of course we will. If you are tired of it because you have a small stake, or from any other reason wish to retire, we desire to go on because we expect to recover a large sum of money." Nothing could, in my opinion, justify Mr. Robinson in withdrawing from the proceedings without giving the other parties interested the most ample opportunity of seeing that justice was done them, instead of slinking out of the case as he has done. If I were to accede to the view of the defendants they would by a side wind escape from answering the charges made against them. Indeed they would not have any opportunity of vindication their character from the charges made against them, and I must say that if I were in their position I would rather have the case really tried than get off in such a way. Every judge, I think, who makes an order of this kind with regard to a test action, intends that the test action should be *bona fide* prosecuted, and the opinion of the court obtained upon the question in litigation. Here the opinion of the court has not been obtained. There has been a complete failure of justice, not by reason of any act of the seventy-seven plaintiffs, but by the act of *their [462 representative, who has thought fit to betray them, leaving them, to use a common expression, in the lurch. I cannot, therefore, allow the judgment in *Robinson v. Chadwick* to bind the other seventy-seven plaintiffs. Mr. Robinson has not conducted the proceedings properly, and I cannot allow them to bind the other plaintiffs. They selected him as their representative, and there having been no *bona fide* trial, I must give them an opportunity of having a *bona fide* trial. Therefore I will allow Mr. Smith's action to go on. The terms of the order will be similar to those of my original order, substituting *Smith v. Chadwick* for *Robinson v. Chadwick*. I make no order as to costs.

From this decision the defendants appealed. The appeal was heard on the 17th of July, 1878.

J. Pearson, Q.C., and *Russell Roberts*, for the appellants: The delay in the trial of the actions is a great hard-

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ship to the defendants. Under the old practice a nonsuit had the same effect as a judgment on the merits, unless there had been mistake, surprise, or accident. What has happened is a consequence of the other plaintiffs not giving Robinson an indemnity against costs, as they ought to have done. There has been no bad faith on the part of the defendants.

Glasse, Q.C., and *Romer*, for the plaintiffs, were not heard.

JESSEL, M.R.: This is really an appeal from the exercise by the Vice-Chancellor of his judicial discretion. What happened was this. There were seventy-eight actions brought by different plaintiffs against the same defendants, for alleged fraudulent misrepresentation in respect of the affairs of the same company. All the actions raise substantially the same question. Of course it would have been a scandal to the administration of justice if all the seventy-eight actions had been allowed to proceed, and in some way or other provision ought to have been made for the trial of the real question between the parties in a single action, if that was possible. Sometimes such a course is not possible, because 463] people will not *be reasonable and will not consent. In that case, I take it, the court could stay the proceedings in all the actions but one, and see what becomes of that one. However, in the present case the parties were reasonable, and the result was that *Robinson v. Chadwick* was fixed upon as a test action. Through no fault that I can discover, either of the plaintiffs in the other actions or of the defendants, that action was never really tried. Mr. Robinson called upon the solicitors who acted for him as well as for the plaintiffs in all the other actions to procure him an indemnity against costs. I cannot see that he had any right to call for that indemnity, or that there was any agreement to give it to him. It was refused, and he thereupon changed his solicitor, and when the trial came on he did not choose to appear, and he was consequently nonsuited, and judgment was entered for the defendants on the merits.

No doubt, the defendants being ready, and, as we are told, anxious to try the case, involving as it does a question of character, it is a hardship upon them that, through Mr. Robinson's conduct, no trial has yet taken place. But they have got an order against him for the costs of the action, and so far no injury has been done to them except the delay. Then the plaintiffs in the seventy-seven other actions, who said that they were not in default, applied to the Vice-Chancellor to substitute another action as the test action, and

they said to him, and I think justly, that the meaning of the order, whatever the terms of it were, was that there should be a trial, one trial, to decide the questions between the parties, and there has been no trial. It was called a test action, and although the order speaks of a judgment, what was intended was that there should be a fair trial of the question which should decide everything between the parties.

Now the judge must decide what is a fair trial, whether there really has been a test action tried, and if he is satisfied that there has not been (and how he could come to any other conclusion on the facts of this case it is difficult to understand), surely he must have jurisdiction to modify his former order, which was intended to prevent the scandal and injustice and waste of time and money which would have been caused by trying the same question seventy-eight times over, so as to secure that which justice demands, viz., that *there should be one fair trial of the issues between [464 the parties. The Vice-Chancellor acceded, and in my opinion rightly and properly, to the application to substitute another action which was ready for trial as a test action between the parties. I think that if the original order had been drafted with the approval or sanction of the judge, it would not have been made quite in its present form, and I think it would now be desirable to reserve expressly the power of hereafter modifying the terms of the order if justice should not be done in the trial of the new test action. But I am of opinion that without any such express reservation the judge must have the power to control the proceedings before him so as to do justice to the parties. The Vice-Chancellor has properly exercised this power, and the appeal must be dismissed.

BRETT, L.J.: It seems to me that no such order as this ought to be made unless the questions in the actions are substantially the same, and the evidence would be substantially the same if they were all tried. But when one of them is ordered to be tried as a test action, that, as it seems to me, means that it is to be tried upon evidence which would be evidence in the other actions. If it happens that a judgment is obtained without evidence, that is not the sort of trial that was intended. If a test action fails to be tried by some accident, by anything, in fact, but collusion with the other parties, it has not been used as a test action, and there must always be a discretion in the judge who made the first order to substitute some other action as the test action.

COTTON, L.J.: I also am of opinion that the order ap-

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pealed from is right. We must really look at the subject of the order of February, 1877.

For the purpose of my judgment I entirely disregard the reference made in that order to *Smith v. Chadwick*, as an action which was to proceed for some purpose or other, and I shall deal with the order just as if it had stayed the proceedings in *Smith v. Chadwick* as it did those in all the other actions.

Now what was the object and intention of that order? There being this large number of actions, the object was 465] that as against *the defendants the question whether or no they had made statements which were false to their knowledge, or which they ought to have known to be false, should be tried in one action. The plaintiffs were to be bound by the decision of that question in what was called the test action. Of course there might be very different questions as regards the several plaintiffs, viz., whether or no in fact they had taken shares on the faith of the representations, and whether they believed them to be true, and therefore the defendants were not to be bound as against the several plaintiffs by the result of what is called the test action. But when it is said to be a test action, what is meant by that? I think the order itself shows that *Robinson v. Chadwick* was to be tried as a test action and to decide the liability of the defendants, subject only to any circumstances affecting the right of the plaintiffs in all the other actions respectively. That assumes, although it is not very carefully worded, that there will be a decision of the rights of the plaintiffs in *Robinson v. Chadwick* as against the defendants in that action, and if from any accident there is no trial of the right of the plaintiffs against the defendants in that action, it cannot be such a trial as was contemplated when the order was made.

Now it is admitted, and indeed cannot be disputed, that in *Robinson v. Chadwick* there was no trial on the merits, and no decision on the merits whether or no the defendants had made misrepresentations. Then comes the question, was that caused by any fault of the other plaintiffs? It seems to have arisen in this way. The plaintiff in *Robinson v. Chadwick* did not like to go on without getting something which the order did not give him, without getting an indemnity against costs from the plaintiffs in the other actions. That being so, it was not tried on the merits, and this without any default on the part of the plaintiffs in the other actions. I do not say there was any default on the part of the plaintiff Robinson except that he did not choose

to go on unless he got something to which he was not entitled, but there was no default at all on the part of the other plaintiffs. That being so, the court ought not to bind them by the result. It is true that there was no default on the part of the defendants, but, although that is so, in my opinion the court ought not to bind the *plaintiffs in [466 the other actions by the result of that trial, when really the merits of the case were never decided. There will be no costs of the appeal.

Solicitors for plaintiffs: *Darley & Cumberland.*

Solicitor for defendants: *H. T. Chambers.*

It is within the power of a court of equity to consolidate actions with or without the consent of the complainant: *Burnham v. Dalling*, 16 N. J. Eq., 810; *Eleventh, etc., v. Hay*, 55 How. Pr., 438.

Though it has been held that actions to foreclose mortgages cannot be consolidated: *Beck v. Ruggles*, 6 Abb. N. C., 69.

But see *Eleventh Ward, etc., v. Hay*, 55 How. Pr., 438.

It is discretionary with the court in all cases to refuse a consolidation: *Blesch v. Chicago, etc.*, 44 Wisc., 593; *Lewis v. Daniel*, 45 Geo., 124; *Crane v. Koehler*, 6 Abb. Pr., 323 note; *Morris v. Knox, Id.*; *Burnham v. Dalling*, 16 N. J. Eq., 810; *Eleventh, etc., v. Hay*, 55 How. Pr., 438.

It is within the discretion of the judge presiding at a trial to order several actions founded on the same subject matter, brought by the same plaintiff against several defendants, to be tried together, although the defendants employ distinct counsel, and the evidence in the several cases is different: *Springfield v. Sleeper*, 115 Mass., 587.

An application under the Revised Statutes for the consolidation of several actions into one, may be made by the plaintiff as well as the defendant: *Briggs v. Gaunt*, 2 Abb. Pr., 77, 4 Duer, 664.

Where the motion for consolidation has been delayed until the causes are called for trial, the defendant will be deemed to have been guilty of such laches as to deprive him of his claim for this relief.

If a defendant wishes to have the suits consolidated he should move before they are brought to trial, so that the other party may have an oppor-

tunity to read affidavits, and be heard as upon an ordinary motion before trial: 11th Ward Sav. Bank v. Hay, 55 How. Pr., 438.

Actions will be consolidated although one suit was commenced before the cause of action accrued in the other: *Dunning v. Bank of Auburn*, 19 Wend., 23.

So a consolidation will be ordered, unless it appear that the plaintiff will suffer great delay or other prejudice if the order be made: *Dunning v. Bank of Auburn*, 19 Wend., 23.

In a motion for consolidation the defendant must show that the causes of action are such as may be joined in the same declaration; that the questions which will arise in both actions are substantially the same, and that no defence is intended, or that the defence will be substantially alike in both actions: *Dunning v. Bank of Auburn*, 19 Wend., 23.

On moving for a consolidation of actions it is not enough for the defendant to show that the causes of action are such as may be joined in one declaration, but it must affirmatively appear in addition that no defence is intended in either of the suits, or that the questions which will arise in them are substantially the same.

It is not an objection to a consolidation that the actions are based on different transactions, provided no defence be intended in either, and the rule is only asked to avoid the expense of entering up several judgments. Per *Bronson, J.*

Nor will the rule in such case be refused, even though the suits be defended, provided the questions to be tried are identical; as where the suits are brought upon distinct contracts

originating in different transactions, and the defendant does not deny the validity of the contracts, but sets up some matter in discharge, going to the whole of the plaintiff's demand, e.g., payment, release, accord and satisfaction, insolvency, bankruptcy, etc. Per Bronson, J.: *Wilkinson v. Johnson*, 4 Hill, 47.

Where there are different parties, plaintiff or defendant, the actions will not be consolidated: *Barnes v. Smith*, 16 Abb. Pr., 420, 422-23.

The consolidation of several actions should not be granted where the debts constituting the several causes of action have been guaranteed by different persons, so that the questions of their liability would be embarrassed by joining the actions against the principal debtor, and allowing only one recovery and execution: *Potter v. Pattengille*, 8 Abb. (N.S.), 189.

It is not sufficient to state that the defence in each suit is substantially the same. The nature of the defence should be disclosed, that the court may determine whether the questions to be litigated are such as can properly be disposed of at one trial: *Crane v. Kochler*, 6 Abb. Pr., 328.

Where plaintiff, in connection with other different plaintiffs in each suit, had brought eleven suits on eleven policies on different parts of the same cargo, the court refused to order a consolidation: *Camnan v. New York, etc., Coleman & Caines Rep.*, 188, 1 *Caines' Rep.*, 114.

In England it has been held, that the court will not compel a party to consolidate actions brought on two promissory notes, though both notes became due and both actions were commenced in the long vacation, and the writs were returnable on the same day: *LeJune v. Sheridan*, *Forrest's Rep. (Exch.)*, 30.

To same effect, *Thompson v. Shepherd*, 9 Johns., 262; *Worley v. Glentworth*, 10 N. J. Law, 241.

Otherwise had it appeared that the defences were the same in all the cases: *Thompson v. Shepherd*, 9 Johns., 262.

The plaintiff brought at one time, and against the same defendants, a separate action in each of the counties of the state, for one and the same libel, which was published in the county in which all of the parties resided:

Held that the defendant's motion to

consolidate the actions into one must be granted. The motion to consolidate was properly made in the county in which all the parties resided.

The time to plead in the consolidated action, in such a case, should be the time which remained in the action in the county to which the other actions were drawn by the consolidation: *Percy v. Seward*, 6 Abb. Pr., 326.

Where the plaintiff has several causes of action which may be joined, one suit only should be brought, otherwise the court will compel a consolidation with costs of the application therefor. In an action of debt to recover several penalties, under the act of Congress, 1790, ch. 29, § 1, against the master of a vessel for shipping seamen without articles, a single count for all the penalties is sufficient: *Wolverton v. Lacey*, 8 *Law Reporter (N.S.)*, 672, District Court U. S., Northern Dist. of Ohio, Wilson, J.

In three penal actions for bribery, by the same plaintiff against the same defendant, the court refused to consolidate them, there being forty instances of bribery declared upon in each action. In penal actions the court will rather require that the trial of each offence should be separated as much as possible, for the convenience of trial. When there are actions in this court and also in another court between the same parties, this court will not impose terms concerning the actions in this court in order to compel anything to be done in the other actions, but application must be made to the court where they are brought: *Benton v. Praed*, 1 *Smith's (Eng.) Rep.*, 423.

While the general chancery practice is opposed to the consolidation of cases having different parties and involving different rights, yet such a practice is proper when the litigation grows out of the enforcement of mechanics' liens under the statute, and may be necessary in some cases to enable the court to settle and adjust the rights of the various lien holders, or those claiming liens: *Thielman v. Carr*, 75 Ills., 385.

Several ejectment causes, depending on the same questions and substantially the same evidence, directed to abide the event of such cause among them, as the plaintiff should notice for trial: *Jackson v. Stiles*, 5 Cow., 282.

So, in New Jersey, the court will order a consolidation of several actions

of ejectment where there is the same question and defence in all the cases: *Denn v. Kimball*, 9 N. J. Law, 335.

A motion by the defendant to consolidate should not be made until the defendants have answered in both actions.

Where the defendants have answered in both actions, and the plaintiff has subsequently amended his complaint, the motion to consolidate should not be made until after the time to answer the amended complaints has expired: *Comstock v. Hallock*, 1 Code R. (N.S.), 201.

Where there are several actions on one policy of insurance, the court will grant imparlances in all but one until the plaintiffs consent to enter into the consolidation rule, which is the same as the English rule: *Clason v. Church*, 1 Johns. Cas., 29.

If two causes turn on the same point, and a verdict be given in one on which a case is made, it is enough to prevent judgment as in case of nonsuit for not proceeding to trial in the other, or a stipulation, but will not excuse costs: *Palmer v. Mulligan*, 2 Caines, 95.

The rule which allows a plaintiff to try only one of several causes, where the questions and the evidence are the same in all, without being subjected to costs for not trying the others, does not apply to actions of slander, etc., where the question is one of damages, to be determined by a jury, but is confined to questions of property: *Sherman v. McNitt*, 4 Cow., 85.

The Wisconsin statute (see § 42, ch. 125, R. S., 1858), respecting the consolidation of actions, provides for such consolidation only, "when the actions might have been joined." *Blesch v. Chicago*, etc., 44 Wisc., 593.

In Californian it is held, that the Supreme Court will not consolidate suits, though brought upon distinct causes of action: *Wallace v. Eldredge*, 27 Cal., 498.

It is not the practice in this state to consolidate actions between the same parties, brought at the same term, but to so limit the costs in cases where several actions between the same parties might have been joined in one, as to do justice and prevent oppression by any unnecessary accumulation of costs: *Curtis v. Baldwin*, 42 N. H., 398.

On a motion for consolidation, costs

will not be allowed when the motion is granted: *Ferris v. Betts*, 2 How. Pr., 78.

In a consolidated action it is not necessary to serve a new complaint. The issue in all the actions are tried as if raised by one complaint and one answer. The summonses and pleadings in all should be incorporated in the judgment roll: 2 Till. & Shear. Pr., 283.

But costs of only one action can be recovered, unless the order for consolidation especially provide for the recovery of costs in all up to the making of the order: *Blake v. Michigan*, 17 How., 228; *Newman v. Ogden*, 6 Ch. Sent., 40.

Where both parties to a suit, ready for argument in the Supreme Court, entered into a stipulation that the cause should abide the event of another suit, upon such a writ of error was brought to the Court of Errors, and that neither party should move in the stipulated cause until the final decision upon the writ of error cause; and the latter cause was decided in favor of the defendant, and the writ of error returned; and at that time the defendant in the stipulated cause died: Held, that judgment *nunc pro tunc*, as of a day previous to his death could not be entered; the cause abated. It was not a case where the delay had proceeded from the court.

To entitle a party to such judgment, the delay must arise from the act of the court. The right to have the judgment must be determined during the life of the other party, and the court will not permit that right to be lost by its own delay. But in this case there was no stay of proceedings by the court. The parties agreed to stay until the decision of another cause: *Ogden v. Lee*, 3 How. Pr., 153.

Where, upon the trial of one of several causes which were consolidated, there was a rule *nisi* obtained for a new trial on a point of law reserved, and the defendant agreed to abandon it, the defendants in other causes were permitted, upon motion, to have the name of another defendant inserted in his place in order to have the benefit of the rule to show cause: *Lubbock v. Claggett*, 3 Smith (Eng.), 397; *Same v. Potts*, Id.

[9 Chancery Division, 466.]

C.A., July 25, 1878.

Ex parte JERNINGHAM. In re JERNINGHAM.

Liquidation Resolutions—Registration—Misdescription of Debtor in Petition—Formal Defect—Amendment—Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), ss. 82, 125—Bankruptcy Rules, 1870, rr. 208, 252, 257, 295—Bankruptcy Forms, 1870, Nos. 106, 111.

A debtor described himself in his liquidation petition by his business address only, omitting all mention of his private residence:

Held, that this was a misdescription; that the defect was not a mere formal one, but was a matter of substance; and that resolutions passed by the creditors in favor of a liquidation by arrangement ought not to be registered.

And an application for leave to amend the petition, and summon a fresh first meeting of the creditors, was refused.

[9 Chancery Division, 469.]

V.C.M., June 18: C.A., July 14, 27, 29, 1878.

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**In re HENLEY & Co.*

Company—Voluntary Winding-up under Supervision—Property Tax—Priority of the Crown.

Where a company is being wound up under the provisions of the Companies Act, 1862, the Crown has a right to payment in full of a debt due from the company for property tax before the commencement of the winding-up, in priority to the other creditors.

The decision of Malins, V.C., reversed.

THIS was a motion on behalf of Her Majesty's Commissioners of Inland Revenue for an order that the official liquidator of W. T. Henley & Co. should, out of the assets of the company, pay the sum of £56 5s. to the Receiver General of Inland Revenue in satisfaction of the Property and Income Tax, Schedule A, due from the company in respect of certain lands at Woolwich held by the company up to the 5th of April, 1877, the payment to be made in priority to the other claims against the company.

The company was being wound up voluntarily under a resolution passed prior to the 5th of April, 1877, and the winding-up had been continued under the supervision of the court.

The motion was heard before Vice-Chancellor Malins on the 18th of June, 1878.

Higgins, Q.C., and *W. W. Karlake*, in support of the motion: The only question is whether the income tax payable by this company is to be paid in priority over other creditors, or whether the Crown must come in *pari passu*

with the other creditors. The question turns upon the acts of Parliament. The 5 & 6 Vict. c. 35, s. 63, No. 9, provides that the occupier of land shall pay the rates and taxes which are to be deducted out of the rent, and every tenant on quitting the occupation is liable for the arrears. Sect. 70 provides that the duty shall be assessed on all lands whether occupied or not, and if unoccupied, and no distress can be found thereon, the collector is to enter upon the lands at any time after when there shall be any distress to be found, and seize and sell as he might have distrained if in the occupation of a tenant. *We rely upon sect. 70 as showing [470] that the Crown has a clear right *to enter upon the premises held by the company, and to levy a distress, and the question is whether the 87th and 163d sections of the Companies Act, 1862, which are not expressed to be applicable to the Crown, control the powers given by sect. 70 so as to prevent the Crown, as it would prevent any ordinary creditor, from levying a distress after the order for the winding-up of the company under supervision. The sections of the act 43 Geo. 3, c. 99, as to levying taxes, are by the 3d section of 5 & 6 Vict. c. 35, incorporated in the latter act. The act of Geo. 3 gives power to the collector to distrain for unpaid taxes. It is clear that the Crown has priority, and has the power of levying taxes in a compulsory mode. The provisions in the act of 1862 (25 & 26 Vict. c. 89), are sects. 87 and 163. The 87th prohibits any proceeding against the company without the leave of the court, and the 163d section is that any distress or execution put in force against the estate of a company being wound up shall be void. But the two sections taken together have been held to give the court power to permit a distress under special circumstances. Our contention is that the Crown is not bound by any act unless the Crown is named in it. That is laid down in Sir B. Maxwell's book on the Interpretation of Statutes⁽¹⁾: "The Crown is not reached except by express words or by necessary implication in any case where it would be ousted of an existing prerogative." Many cases are there cited in support of that proposition.

The Bankruptcy Act will be relied upon in defence. By the 32d section of the act of 1869, it is provided that the debts therein mentioned shall be paid in priority to all other debts. Between themselves such debts shall rank equally, and shall be paid in full, unless the property of the bankrupt is insufficient to meet them, and then they shall abate in equal proportions. The debts named include all paro-

(1) Page 112.

chial and other rates having become due and payable within twelve months, and all assessed taxes, land tax, and property or income tax, but not exceeding one year's assessment. This provision, inserted with the sanction of the Crown, cuts down the right of the Crown, and confers no new right. That shows that the Crown, not being mentioned in the act 471] *of 1862, cannot be affected by it. That act does not apply in any manner to the Crown, and the court cannot interfere with the rights of the Crown.

In the case of *In re Regent United Stores Company* (Jan. 29, 1878), your Lordship decided the question that the Queen's taxes were in the same position as local taxes, and your Lordship made an order restraining the collector from selling any effects of the company under a distress which he had levied for Queen's taxes. In the case of *In re English Joint Stock Bank* (May 24, 1866), it was said by Vice-Chancellor Wickens that as the Crown was not mentioned in the act of 1862, it could not be bound by it; but the question there raised was a different one from this. The question as to priority in respect of local rates was also raised in *In re West Hartlepool Iron Company* (before Vice-Chancellor Bacon, March 30, 1876), and *In re Albion Steel and Wire Company* ('), where the question related to the Poor Law assessment, and it was held that the rules in the Bankruptcy Act giving local rates due from the bankrupt's property priority over his other debts did not, under the 10th section of the Judicature Act of 1875, apply to the case of a company in liquidation.

The last case in which it has been held that the Crown is not bound, unless specially named in the statute, is *Thomas v. Reg.* (').

It is essential for the benefit of the public at large that the rights of the Crown as to levying taxes should be preserved.

There is this distinction between a bankruptcy and a winding-up—that in bankruptcy the whole of the property is divested out of the bankrupt and passes to the trustees, and becomes their property, while in the case of a winding-up there is no such divesting. The property remains the property of the company as it was before, subject to the provisions of the act. The case of *King v. Crump* (') shows to what extent the Crown is bound in cases in bankruptcy; and in Maxwell on the Interpretation of Statutes (') the rule

(1) 7 Ch. D., 547.

(2) Law Rep., 10 Q. B., 44; 11 Eng. Rep., 134.

(3) Tremain's Pleas of the Crown, 637, cited in Baron Parker's Reports, p. 126.

(4) Page 116.

is laid down that where the Crown is not expressly named the inference that the statute was intended to include it must not be doubtful. It must be made out that there was a clear intention *by the act of 1862 that the Crown [472 should be included; and failing that, we ask your Lordship to give us the order.

[They cited Dwarries's Statutes (*).]

J. Pearson, Q.C., and W. Barber, for the liquidator: If the Crown is held to have priority in this case, the effect will be to prevent justice being done between one subject and another for the benefit, as it is said, of all the subjects of the realm. The foundation of all the cases in which the Crown is said to have this priority, is, that it is a debt due on record or by specialty, but not always so even in those cases. This is not a debt due on record. It is a simple debt, but there are some of the same remedies given as if it were a debt of record. That is evident from the act 1 Vict. c. 61, s. 3; and the principle may be deduced from the case of *Uppam v. Sumner* (*) and *Butler v. Butler* (*), that even in debts of record and specialty the Crown has not absolute indefeasible priority, but it might be lost if the subject was prior to the King in taking action. It is not in all cases that the Crown has priority over the subject, but the Crown has priority where the subject has not completed his right to the effect of his judgment before the process of the Crown has been commenced. In this case there has been no distress yet levied by the Crown, and nothing was done by the Crown to obtain payment of the arrears of income tax before the winding-up order was made. The case of *King v. Crump* (*) is not an authority against us. The argument has been that inasmuch as the Crown is not named in the Companies Act, the Crown is not bound by it, but the true reason of the decision in the case cited is, not that the King's prerogative binds, but that the property was not altered, and the extent being on the same day as the assignment the extent comes before the assignment, and the King has priority because his process was commenced before the assignment took place.

As to the difference between bankruptcy and a winding-up, the property only vests in the trustee *sub modo*, because his duty is to pay the debts of the bankrupt, and if there is any surplus it *belongs to the bankrupt. There is [473 no real distinction between bankruptcy and a winding-up,

(*) Pages 524, 535.

(*) 2 Sir W. Bl., 1294.

(*) 1 East, 338.

(*) Tremaine's Pleas of the Crown, p. 637, cited in Baron Parker's Reports, p. 126.

for if there is any surplus remaining in a winding-up after payment of debts by the liquidator, that surplus belongs to the company. It is another mode of paying the debts of a debtor, and refunding the surplus to an individual in the case of bankruptcy, and to the company in the case of winding-up. The reason for giving certain debts, including Crown debts, priority by the 32d section of the Bankruptcy Act, is, that otherwise the Crown would not have had priority. It should also be stated that, by the Income Tax Act (5 & 6 Vict. c. 35), s. 17, there is a provision for the recovery by the Crown of all duties under the act as debts to the Queen's Majesty, with full costs of suit; but there is no allusion to its being a debt of record. It is simply a debt due to the Crown, and not a debt due on record. There is, therefore, a marked difference between this act and the act of 43 Geo. 3, c. 99, by which the taxes were recoverable as debts due on record. If it had been intended to make this a debt of record, words to that effect would have been inserted in the act. The prerogative of the Crown is confined to debts of record: Williams on Executors⁽¹⁾.

Higgins, in reply: That this is a debt of record is plainly shown by 1 Vict. c. 61, s. 3, which recites the 43 Geo. 3, c. 99, s. 45, and also recites 5 & 6 Will. 4, c. 20, s. 13. The act of Geo. 3 recites that such part of the debts due to the Crown as could not be so levied and collected as is therein mentioned may be recoverable as a debt upon record to the King's Majesty; and then it recites that doubts had arisen as to the construction of those acts, and it provides that all taxes then made or thereafter to be made may be recovered as debts of record are recovered, that is, shall be treated as a debt of record.

As to the case of *Uppam v. Sumner*⁽²⁾, that has been overruled, and is now of no value, and the principle of the case is not applicable to this; and there are the two cases, *Rex v. Wells*⁽³⁾ and *Thurston v. Mills*⁽⁴⁾, in which *Uppam v. Sumner* is reviewed; and *Cooper v. Chitty*⁽⁵⁾ is also an important case upon this subject. *Our contention is, that the Crown has priority as having a debt of record, and also it has priority by virtue of the statutes enabling a distress to be levied.

Then as to the analogy derived from the bankruptcy law. The difference between the act of 1862 and the act of 1856 is not merely one of form. The scheme of the act of 1862 is to

⁽¹⁾ 7th ed., p. 992.

⁽²⁾ 2 Sir W. Bl., 1294.

⁽³⁾ 16 East, 278.

⁽⁴⁾ 16 East, 254.

⁽⁵⁾ 1 Burr., 20.

keep the company as a corporation with all the rights of a corporation, except so far as those rights may be temporarily suspended or modified by the interference of the court, and the appointment of an official liquidator. There would be a perfectly good winding-up without any official liquidator being appointed.

MALINS, V.C.: This question is certainly one of considerable importance, although, I am inclined to think, not of so much importance as has been attached to it, because I believe there are very few cases in which there is any income tax due from companies which are being wound up.

With regard to the general question as to Crown debts, I do not think the general law on the subject admits of much doubt, because there has never been any doubt that with regard to certain debts the Crown has priority over general creditors, and it is equally clear that as to other debts the Crown has not that priority. The question is, whether it has that priority with regard to this particular debt for income tax. Now, to show that the Crown has not a general priority over other creditors for all debts, I need not do more than refer to that passage which has been read from Mr. Justice Williams' Treatise on the law with regard to Executors, and which, I believe, states the law with perfect accuracy, namely, "But the debts due to the Crown which are so privileged" as to have priority "are confined to such as are due by matter of record or by specialty, &c. (which are of the same nature: for by statute 33 Hen. 8, c. 39, it is enacted that all obligations and specialties taken to the use of the King shall be of the same nature as a statute staple). And therefore sums of money owing to the King on wood sales, or sales of tin or other his minerals for which no specialty is given, shall not be preferred to a debt due to a subject by matter of record. So, though fines and amercements *in the King's Court of Record are clearly [475 debts of record and entitled to such preference, yet amercements in the King's Courts Baron or courts of his honor which are not of record have no such priority," and so forth. There is no general priority, therefore, in all cases for Crown debts over the debts of the subject. What, then, are the rights with regard to this particular debt for income tax? The income tax was first levied in 1842, by the act 5 & 6 Vict. c. 35. Mr. Higgins has referred me to that act, and particularly to sect. 63, which states in what manner the debt is to be paid, and by whom it is to be paid, and he referred more particularly to No. 9 of the rules and regulations contained in that section with regard to particulars of

deductions and allowances in respect of duties. It is there stated that assessments are to be levied on the occupier, and allowed by the landlord out of the rent. Then, with regard to the nature of the debt, I am referred to 43 Geo. 3, c. 99, to show that all debts due to the Crown are specialty debts or debts of record; and I am referred to 1 Vict. c. 61, which in point of fact relates to debts due to the Crown for taxes generally. It recites the old statute of 43 Geo. 3, c. 99, and other statutes, and then it proceeds: "Whereas doubts have arisen as to the construction of the said acts, and it is expedient to amend the same, be it therefore enacted that all and every the said duties of assessed taxes contained, charged, or assessed in or by any assessment already made or to be at any time hereafter made, may be sued or prosecuted for and recovered, with full costs of suit and all charges attending the same, of and from the person and persons respectively charged therewith in Her Majesty's Court of Exchequer at Westminster by information in the name of Her Majesty's Attorney-General, as a debt or debts due to the Queen's Majesty, her heirs and successors, or by any other ways or means whereby any debt of record or otherwise due to the Queen's Majesty can be recovered." So, because it may be recovered in the same way as a debt of record, Mr. Higgins argues that it is therefore a debt of record. I am of opinion that argument is wholly unsustainable, that it is not a debt of record, but that it is a debt due to Her Majesty, to be recovered in the manner prescribed by the Income Tax Act (5 & 6 Vict. c. 35). Then it is by the 172d [476] section very distinctly shown *that the Commissioners, "executing this act in relation to any of the duties hereby granted shall, within one calendar month after the first day of hearing appeals, all appeals then made being first determined, issue out and deliver to the respective collectors, duplicates of the assessments of the aforesaid duties." And then it provides: "that all such duties as shall be assessed or charged under any of the provisions of this act, if not paid, levied, or collected according to the directions herein mentioned, shall be recoverable as a debt to the Queen's Majesty, with full costs of suit." They are therefore to be recovered as debts due to Her Majesty, not as debts of record, nor anything which amounts to debts of record, but simply—if I may use the expression—as a simple contract debt due to the Crown. Then what is the position of the debt?

The act of Parliament having prescribed the mode in which the debt shall be recovered, and the nature of that

debt, the question is whether, when a company is wound up, the act of Parliament has reserved, or whether it necessarily implies, that the Crown has priority over the general creditors. The Bankruptcy Acts are of much older date than the Winding-up Acts. Winding-up Acts are of a very modern introduction, whereas Bankruptcy Acts, as we know, have existed since the time of the reign of Queen Elizabeth, and the object of the Bankruptcy Acts is no doubt twofold: first of all to distribute the assets of a debtor or bankrupt equally among his creditors; and, secondly, to relieve the debtor from the amount of his debts in order to make him a free man again, which it has always been considered to the interest of the state he should be, in order that he may begin to trade again. The primary object of the Winding-up Acts has been to insure the equal distribution of a company's assets among its creditors, therefore the object is not the same as that of the Bankruptcy Acts. The Bankruptcy Acts vest in the assignee, as he was originally called, or the trustee, as he is now called, all the estate and property of the bankrupt of every description; while under the Winding-up Acts, on the appointment of an official liquidator, the property of a company does not vest in him, but remains in the company, which has still a corporate existence, until it is finally dissolved upon the completion *of the winding-up; but although the property re- [477 mains in the company, the equitable interest in it is in the official liquidator, in my opinion, for the benefit of the creditors; but he has, subject to the control of the court, a complete dominion over the property, and he has that complete dominion for the purpose of dividing the assets equally amongst the creditors. Now, in the case of a compulsory winding-up, this depends on the 95th section of the act of 1862, which says that the official liquidator shall have power, with the sanction of the court, to bring or defend actions or other legal proceeding in the name and on behalf of the company, to carry on the business of the company, and to sell the property and effects. Then he is to do all acts in the name of the company, and to take steps for distributing the assets, which assets are to be divided ratably amongst all the creditors; and the section which applies to this particular case, which is that of a voluntary winding-up under supervision, is sect. 133; and that provides that the following consequences shall ensue upon the voluntary winding-up of a company: first, the property of the company is to be applied in satisfaction of its liabilities *pari passu*, "and subject thereto shall, unless it be otherwise provided by the

regulations of the company, be distributed amongst the members according to their rights and interests in the company." Then liquidators are to be appointed to make calls and adjust the rights of the contributories, and pay the debts of the company *pari passu*. Now, here there is no exception of the Crown whatever, and it would certainly be remarkable that, if it was intended that the Crown should have this priority, there should have been no provision made on the subject. This act was passed after great deliberation by the Legislature. It embodies all the preceding acts for winding up, and if this difficulty with regard to the Crown having priority was intended to be touched, surely it would be impossible to suppose that the Law Officers of the Crown would not have attended to this matter, and that they would not have taken care that that priority, if it was considered that the Crown should have it, would have been reserved. But nothing of the kind is found here. On the contrary, the Crown gives its consent to the act, which says that all the property of the company shall be applied in satisfaction of its liabilities *pari passu*. This particular liability [478] of the company is *one in respect of £56 5s. for income tax; their liability to the other creditors is just the same kind of liability, and it is said that their assets are to be distributed *pari passu*.

Now, there is a similar matter in *pari materia* in the Bankruptcy Act. It is very true that the Bankruptcy Act of 1869 is seven years younger than the Companies Act, 1862, but although Mr. Higgins has pointed out that there is no provision in any of the earlier acts as to income tax, there is a provision as to Queen's taxes in general; and in the 32d section of the act of 1869, which is only a re-enactment of the law as it was before with slight additions, it is provided that the debts thereafter mentioned shall be paid in priority to all other debts; that is to say, all parochial or other local rates due from him at the date of the order of adjudication, and having become due and payable within twelve months next before such time, all assessed taxes, land tax and property or income tax assessed upon him up to the 5th day of April next before the date of the order of adjudication, and not exceeding in the whole one year's assessment. Therefore, in this case, where the attention of the Legislature was directed to the matter, and where the framers of the act had it before them, they do not reserve priority as against the general creditors in respect of income tax without any limit, for whatever may be due is but for one year only. It might be that a large amount

of income tax would be due from a bankrupt by reason of his not having made full returns of his property, and yet against his estate only one year's income tax can be recovered. Why is this? Because it was thought reasonable that in arranging the liability of the debtor, it should be so. It was felt that the Crown ought not to have the whole, but that it should have one year's tax, as in the case of a landlord, who has always one year's rent reserved to him before the property can be distributed in respect of arrears of rent. Therefore, in this case, where the attention of the Crown has been drawn to the matter, one year's arrears is the extent which can be recovered out of the assets of the bankrupt. The 49th section of the same act reserves the liability of the bankrupt to pay the Crown debts;—notwithstanding his bankruptcy he is still liable for the Crown debts, the consequence of which would be, I take it, that if the assets were only sufficient to pay 10s. in the pound for one year's tax, or for whatsoever was due to the Crown, [479 he would remain personally liable. But the question I have to determine here is, to what extent the assets of the company are liable to the Crown as between the Crown as one creditor and the other creditors as a general body.

Now, with regard to these old doctrines as to priority and the extent of the right of the Crown, I confess that after all I have heard from Mr. Higgins and Mr. William Karslake, I am very much disposed to think that that decision of *Uppam v. Sumner* ⁽¹⁾ still remains law, which is that the extent of the right of the Crown is postponed to a judgment previously obtained. Therefore, if a judgment is obtained and duly entered up so that it becomes a charge on land on the 1st of January, and a distress is issued on the 2d of January, under these acts I take it that the judgment entered up on the 1st of January would have priority, and there it is so decided; but in order to test these questions of priority, which are questions of general charges on the land, and not questions of the general application of the assets of a company, we must see which of these processes amounts to a charge on the land.

Now, therefore, finding that in one body of law for the distribution of the estates of debtors incapable of paying in full, the right of the Crown to priority of payment is reserved, as to Queen's taxes, to a limited extent, that is, for one year, but that in the acts for winding up it has not been done, how can I say that it was intended by those acts to reserve the right of the Crown to any extent whatever? It

(1) 2 Sir W. Bl., 1294.

seems to me wholly unsustainable that, having provided that all the liabilities are to be paid *pari passu*, and there being no reservation of the rights of the Crown whatever, I can put that construction upon it. It seems to me to follow that the right of the Crown, the Crown not having levied, for if the Crown had levied beforehand it would have been a different thing—but the Crown, having taken no steps beforehand to recover, must come in under the provisions of the Companies Act, and that these claims must be paid *pari passu* with those of the other creditors.

The 163d section of the Companies Act enacts that, 480] “where *any company is being wound up by the court or subject to the supervision of the court, any attachment, sequestration, distress, or execution put in force against the estate or effects of the company after the commencement of the winding-up, shall be void to all intents.” There is no exception made of a distress by the Crown, or of any process of the Crown, or any mention made of the Crown whatever, but it is expressed generally that all such proceedings shall be void to all intents. No doubt it is perfectly accurate, as Mr. Higgins has argued, that the 163d section must be taken in connection with the 87th section, which provides that where an order has been made for winding up a company no action shall be proceeded with or commenced against the company, except with the leave of the court, and subject to such terms as the court may impose; but in the exercise of my discretion I do not give any leave, because I am satisfied that no right of the Crown was intended to be reserved, and that no right is reserved.

I am of opinion, therefore, that the 133d section regulates the rights of the parties, and that section provides that the general liabilities of the company are to be paid *pari passu*.

Upon the subject of costs, the Crown, I believe, is not now exempted from payment of costs. I decided against the Crown in chambers, and it has now been brought into court upon summons by the Crown, therefore I think the Crown should pay all the costs, including the costs of the summons and the adjournment into court. The case has been very well argued, and I have had all the information I could have had. I have not gone into all the old authorities, because I think they have not much application to this matter.

From this decision the Commissioners of Inland Revenue appealed. The appeal was heard on the 24th of July, 1878.

Higgins, Q.C., and *W. W. Karlake*, for the appellants.
J. Pearson, Q.C., and *W. Barber*, for the liquidator.

The same arguments were adduced as in the court below. The following authorities were referred to: *Giles v. Grover* (1); *Uppam v. Sumner* (2); *Rex v. Wells* (3); *Sir T. Cecil's Case* (4); *Williams on Executors* (5); *Bacon's Abridgment* (6); *Maxwell on the Interpretation of Statutes* (7); *In re Albion Steel and Wire Company* (8); *In re Regent United Service Stores*; *Buckley on Joint Stock Companies* (9); *Manning's Exchequer Practice* (10).

JAMES, L.J.: It appears to me clear on every principle that the Crown is not bound by the Companies Act, 1862, not being specially mentioned in it. The Crown is not debarred, in respect of any sum of money due to it, from taking proceedings against the property of the debtor; and by the Income Tax Act the right is given to the Crown to distrain upon any of the debtor's chattels for the arrears of the tax. Independently of that act, it is a debt due from the person in possession of the property in respect of which it is claimed. The company is in possession of the property; they are the tenants, and are liable to pay the tax. Therefore there is nothing to prevent the Crown from suing the company or distraining their chattels, not only on the property, or anywhere else. There being this right, the Crown says that it does not wish to exercise its power of distress, but instead of that, asks to be paid in priority to the other creditors; and the liquidator, on behalf of the company, is ready to admit that right. That being so, it being clearly a debt due to the Crown, and a debt in respect of which the property of the company might be taken, I think it is right and proper that the liquidator, as an officer of the court, should pay the debt without allowing the distress to be made.

But if the matter is treated as a matter solely of administration of assets under the direction of the court, I think it is also right. Whenever the right of the Crown and the right of a subject with respect to the payment of a debt of equal degree come into competition, the Crown's right prevails. Whether, therefore, the debt is treated as a debt of record, or of specialty, or of simple contract, *there being a [482

(1) 1 Cl. & F., 72.

(2) 2 Sir W. Bl., 1294.

(3) 16 East, 278 n.

(4) 7 Rep., 18 b.

(5) 7th ed., 991, 993.

(6) Prerogative, E. 4; Executor, L. 2.

(7) Page 112.

(8) 7 Ch. D., 547.

(9) Page 336.

(10) Pages 2, 12.

right of priority in the Crown, it is right that the debt should be paid.

BRETT, L.J.: I am of the same opinion. There are two prerogatives of the Crown bearing upon this question. The first is, that the Crown is not bound by a statute in which it is not specially mentioned. Therefore the Crown is not bound by the Companies Act. It follows that, this being clearly a debt for which the Crown can distrain, its power of distress is not taken away by the act, and it can proceed to distrain in this case. It is therefore right that the debt should be paid in priority to the other creditors.

But suppose we regard it merely as a simple contract debt; then in the administration of the assets of the company the Crown comes into competition with the other simple contract creditors, and then the other prerogative to which I have alluded comes in, namely, that in competition with subjects the right of the Crown must prevail. Therefore, in whichever way we look at the question, I think the Crown ought to be paid this debt in priority.

COTTON, L.J.: I am also of the same opinion. In general, the Crown is not bound by a statute unless expressly mentioned, or referred to by necessary implication. In this case the Crown had a clear right of distress on the property of the company, and the question is, whether that right is taken away by the Companies Act, 1862. It is clear to me that this act does not apply to the Crown. It has been so held with regard to the Bankruptcy Acts, and in my opinion the same principle applies to the Winding-up Acts. Their object is only to secure a division of the assets among the creditors. That being so, the Crown, having a right of distress which is not taken away by the statute, says, "I do not desire to go in and exercise my right of distress if the debt is paid in some other way." Then the court may direct the liquidator to pay the Crown in priority to the other creditors, rather than oblige the Crown to enforce its right by distress. That is my way of looking at the present case. 483] *But if the case is looked at as one in which the Crown submits to come in under the administration of assets in the winding-up, there is still the right which the Crown has when in competition with other creditors, of being paid in priority. I think, therefore, in either view, that the Vice-Chancellor's decision ought to be reversed, and that the liquidator ought to pay this debt.

Solicitor for Crown : *Solicitor to the Inland Revenue.*

Solicitor for company : *J. W. Starkey.*

Without a statutory provision to the contrary a state, or the United States, is entitled to priority of payment out of the assets of an insolvent debtor: *Orem v. Wrightson*, 51 Maryland, 34; *Couard v. Atlantic, etc.*, 1 Peters, 386; *U. S. v. Hooe*, 3 Cranch, 73.

And a surety who is compelled to pay may be subrogated to the rights of the state: *Orem v. Wrightson*, 51 Maryland, 34.

The rule does not apply in

New Jersey: *Board, etc., v. State, etc.*, 30 N. J. Eq., 311.

See *Trustees, etc., v. Trenton*, 30 N. J. Eq., 667.

A state, or the United States, is not liable for costs, even in a suit brought thereby, except by virtue of a statute: *U. S. v. Boyd*, 5 How. (U.S.), 29; *U. S. v. Barker*, 2 Wheaton, 395; *The Antelope*, 12 Wheaton, 546; *U. S. v. McLe-*

more, 4 Howard's U. S., 286; *Noyes v. State*, 46 Wisc., 250; *Maine v. Webster*, 8 Maine, 105; *Note to Trustees, etc., v. Trenton*, 30 N. J. Eq., 667.

See *U. S. v. Ringgold*, 8 Peters, 150.

Nor for the amount of a counterclaim set up by a defendant in a suit by the state: *People v. Dennison*, 59 How., 157; 8 Abb. N. C., 128, affirmed by gen. term Supreme Court.

A state cannot, without its consent, be sued: *Troy, etc., v. Commonwealth*, 127 Mass., 43; *People v. Dennison*, 59 How. Pr., 157; *American, etc., v. Trustees*, 32 N. J. Eq., 428.

Though a state may not be sued, its grantees may: 1 *Life Benjamin R. Curtis*, 433.

A state may appear and consent to litigate when it is bound by the result: *Tappan v. R. R. Co.*, 3 Lea (Tenn.), 106.

[9 Chancery Division, 483.]

V.C.M., July 25: C.A., Aug. 7, 1878.

ASHWORTH V. OUTRAM.

[1876 A. 35.]

Costs—Shorthand Notes.

On the hearing of an application before Vice-Chancellor Malins, the solicitors of the plaintiff and defendant agreed that a shorthand writer should be employed at the joint expense of the plaintiff and defendant to take notes of the proceedings. An order was made in favor of the defendant, from which the plaintiff appealed, and the Court of Appeal dismissed the appeal with costs, nothing being said about the shorthand writer's notes. The Taxing Master, in taxing the defendant's costs of the appeal, disallowed the costs of copies of the shorthand notes, except those of the judgment of the Vice-Chancellor, and also disallowed the sum paid by the defendant to the shorthand writer:

Held, by Vice-Chancellor Malins, that both the above items ought to be allowed:

Held, by the Court of Appeal, that the Taxing Master could not allow these items without a special direction from the court, and that as the Court of Appeal in dismissing the appeal had not given any directions as to them, they could not be allowed, and that the agreement between the solicitors did not make any difference in the case.

THE plaintiffs having appealed from an order of Vice-Chancellor Malins, made on the 15th of March, 1877, the Court of Appeal, on the 17th of May, 1877, dismissed the appeal with a direction that the plaintiffs "do pay to the defendant S. Outram, widow, her costs of this appeal, to be taxed by the Taxing Master" (1).

Before the hearing in the court of Vice-Chancellor Malins the *solicitors of the plaintiffs agreed with the so- [484
licitors of the defendant that a shorthand writer should be

(1) 5 Ch. D., 923; 22 Eng. R., 550.

employed at their joint expense to take notes of the proceedings, which was accordingly done.

The bill of the defendant's costs of the appeal included the following items:—

	£	s.	d.
"Two copies shorthand notes, fol. 1289, each	42	19	4
"Paid for shorthand writer's charges as agreed	33	16	0."

The Taxing Master disallowed these items. The defendant carried in objections to the disallowance, "Because an agreement was come to by the solicitors of the plaintiffs and of the defendant that a shorthand writer should be employed at the joint expense of the plaintiffs and of the defendant, to take notes of the proceedings and evidence, and the shorthand notes above mentioned were taken in pursuance of such agreement, and were actually used by both the plaintiffs and the defendant, and also by the Court of Appeal, on the argument before the said Court of Appeal of the appeal from the Vice-Chancellor's order of the 15th of March, 1877.

"As to the said item of £33 16s. above mentioned, because the item is an actual payment made by the defendant's solicitors to the agents of the plaintiffs' said solicitors of one moiety of the costs of taking the said shorthand notes in pursuance of the said agreement."

The copies of the shorthand notes included the arguments of counsel, the *viva voce* evidence, and the judgment of the Vice-Chancellor. The Taxing Master, on the objections being brought before him, modified his taxation by allowing so much of the first item as was attributable to the copies of the judgment of the Vice-Chancellor, but disallowed the rest, and adhered to his disallowance of the second item. The defendant took out a summons to review the taxation, and the Vice-Chancellor in chambers decided that both the items ought to be allowed. The plaintiffs moved to discharge this order on the 25th of July, 1878.

Glasse, Q.C., and Nalder, for the motion.
485] **J. Pearson, Q.C., and Freeling*, contra.

MALINS, V.C.: This is a case in which there were a number of witnesses examined *viva voce*, and it was well known to the solicitors on both sides that the evidence would be very contradictory. They therefore agreed beforehand that there should be one shorthand writer employed. Mr. Glasse says it was agreed that they should pay the expenses of the shorthand writer equally between them. On the other hand, Mr. Pearson says the agreement was that the costs

should be costs in the action, that is, that this was a proper expenditure to be allowed in the taxation of costs. I have no doubt whatever that each party had made up his mind to appeal before the trial came on, if the decision should be against him. With what view then was the evidence to be taken? I think it was because both parties agreed that it would be necessary for the information of the Court of Appeal, and if there was no appeal then the shorthand notes would be necessary for the information of the solicitors on each side. My opinion is that they were proper costs on the appeal, and that they were properly taxed as costs in the cause. The mode of taking evidence by *viva voce* examination has introduced an entirely new system in conducting the trial. I always make a point of taking full notes myself of the evidence, but when I know that a shorthand writer is engaged, I occasionally refer for the purpose of saving time to the shorthand notes. What I have said, applies more particularly to the notes of the evidence. I understand that the notes of the judgment are not objected to, but there remains the question as to the notes taken of the speeches of counsel. There might have been a doubt whether the costs of taking the speeches should have been allowed, but as both parties knew that the speeches were taken, and raised no objection at the time of the trial, I am of opinion that they cannot now be objected to. Therefore I think all the costs of the shorthand notes should be allowed as costs in the cause. The motion will therefore be refused with costs.

The plaintiffs appealed. The appeal was heard on the 7th of August.

**Glasse*, Q.C., and *Nalder*, for the appellants: [486 The Taxing Master proceeded according to the regular practice in disallowing these items. Such expenses cannot be allowed without a special direction from the judge, which should be asked for at the time when judgment is delivered: *Kirkwood v. Webster* ('); *Bigsby v. Dickinson* ('). The agreement to share the expense of a shorthand writer does not make that expense part of the costs in the action: *Brooke v. Wigg* (V.C. B., July 27, 1878.)

J. Pearson, Q.C., and *Freeling*, contra.

JAMES, L.J.: I am of opinion that the Taxing Master properly disallowed these items in taxing the costs of the appeal, and that the decision of the Vice-Chancellor cannot be sustained. The agreement between the solicitors does

(') *Ante*, p. 239.

(') 4 Ch. D., 24-32.

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not appear to me to make the slightest difference in the case, it was a mere arrangement for saving expense, and leaves the case on the same footing as if each party had employed his own shorthand writer. It is clear that the Taxing Master could not allow these items without the special direction of the court. If such a direction had been asked for when the case was before the Court of Appeal, possibly it would have been given; but it was not asked for, and we can only take the order as it stands. It is a simple dismissal of the appeal with costs, without any special directions, and these costs were properly disallowed.

BRETT, L.J.: Under the order of the Court of Appeal as it stands, the Taxing Master could not allow these costs, and the order of the Vice-Chancellor is, in substance, an alteration of that order, which alteration the Vice-Chancellor had no power to make.

COTTON, L.J., concurred.

Solicitors: *Layton & Jaques; Sewell & Edwards.*

Upon the trial of an action before a referee, the attorneys for the respective parties agreed, for convenience, to employ a stenographer to take the minutes, each party to pay one half the expense of his so doing. The defendant having been successful claimed, upon presenting his bill of costs for adjustment, to have allowed the sum of \$1,847, paid by him to the stenographer. Held, that the item was properly rejected by the clerk; that such item was not a disbursement within the meaning of the law regulating the adjustment of costs: *Colton v. Simmons*, 14 Hun, 75.

Where a cause had been three times tried, the expense of copies of notes taken by the stenographer on the first

two trials cannot be allowed; though very useful, they are not necessary disbursements under section 811 of the code: *Hamilton v. Butler*, 4 Rob., 654; *Spring v. Day*, 44 How. Pr., 390; *Provost v. Farrell*, 13 Hun, 303.

But see *Flood v. Moore*, 2 Abb. N. C., 91.

Where a case on appeal is proposed, and the respondent makes affidavit that the stenographer's notes, taken on the trial (or a portion of them), are necessary to enable him properly to propose amendments to the case, the expense of procuring such notes is a proper item of taxation in the adjustment of costs at the general term: *Sebley v. Nichols*, 32 How. Pr., 182.

[9 Chancery Division, 487.]

V.C.B., Nov. 24, 1877. C.A., May 10, 13, 14, 1878.

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{1877 R. 116.]

WARD V. ROBINSON.

[1877 W. 241.]

Trade-mark—Exporting Agent—Custom of Manchester.

An arrangement was made between W., R., and G., that W., a manufacturer, should consign cotton cloths to G. in Rangoon, paying him an inclusive commission. The goods were to be exported through R., who acted as shipping agent, and was to see to the goods being finished and packed, for which services he received a commission from G. A particular mark was by arrangement between the three parties adopted for the goods, of which some portions and the general arrangement were new, and other portions consisted of R.'s name and arms, and of a symbol which had formerly been used by G. After goods had been regularly exported for some years under this arrangement, W. ceased to send goods through R., and commenced exporting them to Rangoon through the agency of F., continuing to use the old mark, except that the name and arms of F. were substituted for those of R. At the same time R. commenced exporting other goods under the old mark.

Cross actions were commenced for injunctions, in which R. set up an alleged custom in Manchester, giving the right to the trade-marks to the shipping agent :

Held, upon the evidence, that no such custom existed.

Held, also, that neither R. nor W. had any exclusive right to the use of the mark, and that both actions must be dismissed.

In the year 1870, Robinson, who was a shipping agent or commission merchant at Manchester, and had dealings with Galbraith & Co. at Rangoon, introduced Ward, a cotton manufacturer, to a member of the firm of Galbraith & Co., and an arrangement was come to for Ward to consign white shirtings to Galbraith & Co. at Rangoon through Robinson. Ward agreed to pay to Galbraith & Co., as consignees, a commission of £8 per cent., but did not engage to pay anything to Robinson, who, however, by an arrangement between himself and Galbraith & Co., was to receive out of the £8 per cent. payable to them a commission of £1 per cent. The bleaching and finishing of the goods was to be done under the direction of Robinson, but at the expense of Ward. It was agreed that the goods should be stamped with certain marks. Upon the *outer fold of each [488 piece were two tickets, one of which bore the arms and crest of Robinson, the other contained an elephant which was suggested by Galbraith & Co. Over each ticket were stamped the words "superior manufacture," and under those words were stamped the words "George Robinson &

Co., Manchester." In the middle of the fold, between the two tickets, was stamped the figure of a stag, which was a mark that had previously been used in the trade, but Robinson alleged that he had chosen it on the present occasion because a stag bearing a shield was part of his own armorial bearings. Below the stag was a set of numbers known in the trade as "range numbers," 000, 111, 222, and so on up to 999, denoting the quality of the cloth. These range numbers had never before been used, except that some of them had been used on Ward's goods shipped to other markets. Business was carried on upon this footing on a large scale for seven years, Ward generally supplying goods of his own manufacture, but sometimes, when his mills were in full work, sending similar goods, which he purchased from other makers. These marks were settled by arrangement between the parties for the purpose of this particular business, and confined to it, but beyond this no special agreement between them as to the right to the marks was proved. Neither the range numbers nor the general combination was ever, during the continuance of business under the arrangement, used on any other goods than Ward's.

In the beginning of 1877 Ward ceased to send out goods through Robinson, and commenced sending out to Rangoon, through Finlay & Co., goods bearing marks similar to the above marks in general arrangement, but having the name and arms of Finlay substituted for those of Robinson, and the stag replaced by an antelope. At the same time Robinson commenced shipping to Rangoon goods not manufactured or exported by Ward, and used upon them the old range numbers and the entire combination of marks without any alteration.

Robinson and his partners, on the 7th of June, 1877, commenced an action against Finlay & Co., and Ward, to restrain them from using or imitating the old marks which he claimed as his own trade-marks. Ward, a few days afterwards, commenced his action against Robinson & Co. 489] to restrain them from exporting to Rangoon *any shirtings not made by Ward bearing marks similar to those used by Ward.

Robinson made the case that, according to the custom of the trade in Manchester, all marks placed upon exported goods were, in the absence of express agreement, the trade-marks of the shipping agent or shipping merchant, whether the goods so shipped were his own or were shipped by him as agent for the owner of them. A great deal of evidence was gone into on this question. One witness, who had car-

ried on a very large business at Manchester in exporting goods both on his own account and on commission, deposed that there was no known and universal custom on the matter in Manchester, and that when his firm, on exporting manufacturers' goods on commission got up a set of marks for the purpose, they took a written agreement from the manufacturer that the marks should belong to themselves; and the witness considered that if this was not done they had no right to prevent the manufacturer afterwards using the marks. Another very large Manchester exporter gave evidence to the same effect, with the qualification that, if part of the marks consisted of the commission agent's name and crest, he considered that the manufacturer would not be at liberty to use this part of the marks after the agency had ceased, but it would remain the exclusive property of the exporting agent. He agreed as to there being no known custom in Manchester which would determine the right to the marks in the absence of special agreement; and this was the general effect of the evidence.

It was alleged by Ward that the range numbers and the general combination were the features by which the natives recognized the goods; that English names and words were of no importance; and that Robinson's name would be unknown to the purchasers. Robinson maintained that his arms and crest, if not his name, formed the essence of the trade-mark, and proved that in a price current sent to England from Rangoon, the goods were quoted as "Robinson's."

The actions were heard before Vice-Chancellor Bacon on the 24th of November, 1877.

Sir H. Jackson, Q.C., and *Bryce*, for Robinson, contended that Robinson was entitled, by virtue of his engagement with Ward and *the custom of the trade, to the ab- [490] solute property in these marks which had been designed by him and affixed to the goods which he was employed to ship to Rangoon.

Hemming, Q.C., *A. L. Smith*, and *Grosvenor Woods*, for Ward: Robinson was employed in the transactions as Ward's agent for shipping the cottons to Rangoon, and could not dispute the title of his principal to all trade-marks used in the business except the arms and crest of Robinson, which were recognized as marks personal to him. Trade-marks in their nature indicate ownership, and never are understood to point to a mere agent. The vendor of the goods is the owner of the good-will of the trade, and therefore of the trade-marks which protect it.

The custom alleged by Robinson, that the shipping agent

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is entitled to the marks affixed by him to denote his principal's goods, is inconsistent with the relation of principal and agent in which the parties stood, *Mollett v. Robinson* ('); and further, an agent can derive no profit from his employment but that for which he has, by his contract of agency, expressly stipulated. But as a matter of fact no such custom was proved.

BACON, V.C.: Mr. Robinson, a member of a firm at Manchester, admittedly of great reputation and with very extensive dealings, has carried on for many years the business of exporting goods from England, and procuring sale of them in foreign parts. Mr. Ward is a manufacturer of cotton in England, and his commodity goes naturally and usually to foreign parts. The parties came together and agreed that Robinson should export to Rangoon goods of the manufacture of Mr. Ward that they might there be sold for Mr. Ward's benefit; and one of the many arguments urged was, that the trade so established was Ward's trade and not Robinson's. That is a very important question, and is only to be solved by the consideration of the relation of the parties and the transactions between them. Mr. Ward manufactures cotton, Mr. Robinson undertakes to ship through the agents Galbraith (who may as well be left out for all the purposes 491] I am considering now, because *they are mere agents), for sale at Galbraith's house at Rangoon, the cotton manufactured by Mr. Ward. But that is not all. Mr. Robinson has an established reputation as a merchant bringing goods into foreign markets; it was, therefore, necessary that he should take precautions for the protection of that established trade of his. Although he acted in a sense as the agent of Mr. Ward, it cannot be said with any reason or propriety that that rule of law which has been invoked in the course of the discussion, that an agent can take no greater benefit than that which he contracts for with his principal, has the slightest application to the case before me, even if it be treated as a case between principal and agent. Mr. Robinson has his own independent substantive business to look to. He goes into that business and, as a part of it, sends to Rangoon Mr. Ward's goods. He first of all has his own reputation to protect, and he has the goods sent to him in their raw state, and has them bleached by bleachers whom he employs and in whom he has confidence. He has the goods finished, so that they are in a fit state to be presented in the market at Rangoon. Then, for the protection of his trade, and also for the benefit of the sale which he was to make for Mr.

(1) Law Rep., 7 H. L., 802; 1 Eng. R., 335.

Ward, he suggested that it was necessary that these should have a distinctive mark, which is commonly called a trade-mark, and this is discussed between Ward and Robinson; and Mr. Robinson combines several devices which he thinks the best calculated to secure a sale in the Rangoon markets. There being different qualities of this cloth, it was necessary that their difference of quality should be distinguished by numbers, and accordingly what is called a range of numbers is put upon the proposed device. [His Lordship, after referring to the other marks continued:] But all these, whencesoever they may have been derived, were combinations made by Mr. Robinson, and for the purpose of distinguishing those goods the sale of which he undertook. This is agreed to be adopted by Mr. Ward. He says the design was submitted to him and approved, and ultimately it assumed that shape which has appeared on the things exhibited. In that state of things Mr. Robinson, being satisfied that the finishing had been perfected, and that the goods were in such a state as that he could, having regard to his own reputation and established business of an export *merchant, submit them for sale to the Rangoon [492 market, put on the goods besides that an inscription certifying that the goods are of superior manufacture, selected by Mr. Robinson and his firm, and added the name of his firm upon the face of the sheet of muslin which is so exhibited. That is the trade-mark which, under these circumstances, he devised for the purpose of his own trade to the market of Rangoon. That is not disputed, and indeed it is not capable of being disputed; but Mr. Ward says that, inasmuch as these things were put on his goods, he became entitled to these trade-marks. By what process? under what contract? It is said that he paid for the stamps, which was only the most ordinary course of business. Mr. Robinson had gratuitously, I suppose, made him the designs, but of course he was not going to engrave them. The stamps were engraved, naturally, at the expense of Mr. Ward, for it was for his benefit they were supplied in the first instance. Under those circumstances, Mr. Ward sends to Mr. Robinson the shirtings. They are sent by Mr. Robinson to the bleachers, and they become white shirtings. They are sent in that state to the Rangoon market. They are quoted in the price current of the Rangoon market as Robinson's shirtings, with the numbers upon them. The trade-mark established was the trade-mark of Robinson and not the trade-mark of Ward. Ward kept his name back. Ward says that that was at Robinson's instigation; but that is not admitted by Robinson. It

is notorious, and it appears even on the evidence, though not very distinctly, that the manufacturer of cotton goods does not export in his own name. There is a very good reason why he does not. The merchants who buy in the English markets and sell in a foreign market would be surprised and dissatisfied if they found that the man whom they employed at Liverpool or Manchester was their competitor at Rangoon or Burmah; but I assume that Mr. Robinson did say, "I advise you not to put your name on the goods." The advice was accepted, and it was not fraudulent advice. There was a very good reason for it. Mr. Robinson puts his own name on the goods, not as the manufacturer, but as the person who has selected them, and on his implied guarantee these goods are sent into the market. Where are we to find the beginning of a claim on the part of Mr. Ward to 493] any property in this *combination which Mr. Robinson had devised, and which Mr. Ward approved of? Whether it was expressed or understood only by Mr. Robinson that the device should be used only so long as Ward continued to supply him with goods, is a matter I cannot fix with any certainty, nor is it necessary I should try to do so, since on the facts I have mentioned, and which are clear upon the evidence, the design was Robinson's, invented by him for his own trade at Rangoon, although invented for the convenience, and perhaps for the benefit, of Mr. Ward. How did Robinson part with his property? [His Lordship then discussed the evidence and continued:]

In such a state of evidence as herein exists, I am obliged to ask where does Mr. Ward acquire a right to these marks? They are not his marks. As between himself and Robinson, they do mean his goods, but they do not express to the public they are his goods. Nobody can be deceived or misled by buying these goods which have these marks to the prejudice of Ward. The only prejudice would be to the prejudice of Robinson, if he has so far betrayed the trust which purchasers placed in him on the faith of these marks, and the insertion of his very name on the goods. But that would cause no liability to Ward. How is Mr. Ward injured? In 1870 he wanted to export goods to Burmah. He could not do, or did not choose to do it without the assistance of a shipping merchant. He applied to Robinson, who agreed to do it in the manner and upon the terms mentioned. Then their business arrangements came to an end. He was in the same position as he was before. He could have employed any other shipping agent, and any other shipping agent could as well have provided a device if he thought it neces-

sary. On what principle can Mr. Ward say that, now he has ceased to send goods through Robinson who has established this as his trade-mark, he will carry away his trade-mark and apply it to his (Ward's) goods? There is no pretence whatever for the claim which Ward makes. I think Mr. Robinson has established a right to the property in this trade-mark, and I think he is entitled to an injunction to restrain Mr. Ward from infringing by imitation or otherwise that trade-mark given in evidence here.

Then I must say that I am not at all satisfied that there was any necessity for any other suit than that which Mr. Robinson at *first instituted. It is not necessary to carry [494 that any further. I think the defence and counter-claim would have raised every question, and that the court would have had full power to adjudicate upon the case, and I regret that the expense of a second suit has been occasioned. The good sense of the parties before me has prevented that being a very great inconvenience, because the counsel engaged have agreed that the two should be treated as one suit, and as one suit it has been treated.

An attempt was made to introduce some suggestion of custom. No doubt there is the expression in Mr. Robinson's answer "according to the custom," by which I suppose he means the established practice in Manchester; but when several gentlemen of the highest respectability are called to prove as witnesses on either side a custom, it appears there is no custom at all, and there is not even a usage. Each man does what he thinks right in each particular case. [After referring to the evidence, his Lordship continued:] Custom, in my opinion, is out of the question. The dealings between the parties—the contract between the parties is all I have to regard. Mr. Ward's point was that he should have his goods exported to Rangoon, and that his name should not appear upon them; or, if it is said that is putting it too strongly, at least that the name of Robinson should appear upon them as being the exporter, and the person who, in the Rangoon market, and the price-current list, or in any other transaction, was held to be the man dealing in the commodities. After that, in my opinion, it is in vain for Mr. Hemming to maintain that which he says is necessary to his case, namely, that the property is in Ward, because the business carried on was Ward's. In my judgment, it was no more Mr. Ward's business than it was mine. It was Mr. Robinson's business in his character of exporter, not manufacturer. In the market at Rangoon he was not supposed to be a manufacturer, and there is an

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inscription there which English merchants could read and understand, and which I dare say Rangoon merchants could read and understand; or if they could not, would have translated to them. These goods come out with an inscription upon them, which shows that Robinson, the Manchester merchant, has selected these goods, and it is on this guarantee that purchasers are asked to spend money upon 495] them. The *property in this stamp is distinctly proved and established to be Robinson's, and I think therefore he is entitled to the injunction he asks. I can only reject the claim which Mr. Ward makes as being the owner and proprietor of these trade-marks, and say he is not at liberty to use them.

Ward, and Finlay & Co., appealed. The appeal came on to be heard on the 10th of May, 1878.

Hemming, Q.C., A. L. Smith, and Grosvenor Woods, for Ward, and Finlay & Co.: The goods were Ward's goods, the trade his trade, and therefore the marks his trade-marks, Robinson & Co. being only his agents or sub-agents, and he has now a right to give Finlay & Co. authority to use these marks. We claim the right to use the old marks in their entirety on the ground that they were used simply to denote our goods, even though Robinson's name and arms formed part of them; but to avoid all question we have substituted the name and arms of the new agent for those of Robinson, preserving the range numbers and the general combination. The marks belong to the person who has the good-will of the trade: *Hall v. Barrows* (*). Robinson cannot have any right to a reputation acquired by the sale of our goods. That must belong to the person to whom the goods belong; and the marks have no value except so far as they carry with them that reputation which has been the result of our trade carried on at our risk. In fact, the right to use a trade-mark means the right to assert what the trade-mark has come to mean. In this case the trade-mark asserts that the goods stamped are goods offered for sale by the same owner who has been supplying goods under that mark for several years. That assertion would be false as to the goods which Robinson is now sending out, but true as to Ward's shipments. Ward, therefore, is entitled to use the old mark, and Robinson is not. In *Makepeace v. Jackson* (*) it was held that the principal had a right to the benefit of an invention by the agent made in the course of the agency. 496] There clearly was no custom, *and as clearly no

(*) 9 Jur. (N.S.), 488; 10 Jur. (N.S.), 55; 4 D. J. & S., 150. (*) 4 Taunt., 770.

contract beyond the understanding that the marks were to be used on Ward's goods alone.

Sir H. Jackson, Q.C., and Bryce, for Robinson: We say that the trade-mark was used to denote a set of goods for the quality of which Robinson was responsible, and Ward cannot have a right to use it for other goods. Robinson had a reputation depending on a long character in business, and if Ward were to send out inferior goods bearing the marks used by Robinson, Robinson's reputation would suffer.

[BRAMWELL, L.J.: Can the parties be supposed to have intended that after Ward had acquired a reputation for goods exported under this mark, Robinson should be entitled to turn round and say that Ward should no longer use it?]

That is not the case which has occurred.

JAMES, L.J.: When the real facts of the case are ascertained, it appears to me a reasonably clear case, and my view is not in accordance with that of the Vice-Chancellor, except that I quite agree with him that there is no evidence of any particular bargain or of any particular custom, or of any usage which will affect the rights of the parties, and I also agree with him in saying that Mr. Ward did not acquire any right to restrain Robinson from using this combination, or any colorable imitation of this combination.

The circumstances certainly are very peculiar, and the question as to the trade-mark arises under circumstances which appear to me to be entirely novel. At the time of the commencement of the relations between Ward, Robinson, and Galbraith & Co., no one of the parties had a right to any trade-mark whatever as connected with cotton goods going to Rangoon. Robinson & Co. had some years before occasionally, as shipping agents, been connected with sending goods to Rangoon, but the particular trade in question was altogether new. Robinson being closely connected with the firm of Galbraith & Co. in Rangoon, was minded to get for them business which would redound to his own profit. He introduces Ward to Galbraith & Co., or rather to Mr. Galbraith, a member of that firm, the result of which introduction is, that Ward agrees to *consign his goods [497 to Galbraith & Co. in Rangoon, and also agrees (which seems to me to be an essential part of the arrangement) that for the protection of Robinson, who had a great interest in the matter, the goods should be sent through Robinson to Galbraith & Co., that is to say, that none of the goods should go without having passed through the hands of Robinson, who had a great deal to do with the finishing of them, the packing of

them, and the shipping of them, and as to advising them. He had important duties to discharge towards Galbraith & Co., because he was to advise them about the extent to which they might advance moneys upon the goods he was sending, and he was to receive 1 per cent. commission out of the 8 per cent. commission given by Ward to Galbraith & Co. Ward was the owner of the goods, and was to be the consignor, and Galbraith & Co. were to be the consignees. The goods remained Ward's till they were sold, and when they were sold Galbraith was to return the money to Ward.

Under this arrangement the business was carried on for some years; the goods were Ward's, Galbraith was the consignee, and Robinson was the intermediate man. For the purposes of that business, and of that business only, viz., the consignment of Ward's goods to Rangoon, particular trade-marks were devised, apparently by joint consultation between all the parties, or at all events by a joint consultation between Ward and Robinson; and for the purposes of that business Robinson's crest, name, and coat-of-arms were taken, and a white elephant was added, being a mark which Galbraith & Co. had previously used for other trades. Those were the marks which the three agreed to use upon the goods in which the three were interested in the way I have stated. What, then, did those marks indicate? If anybody had asked that question he would have been told that they indicated goods either manufactured or bought by Ward, which passed through Robinson's hands (who to a certain extent was answerable for the mode in which they were finished), and were sent out to Galbraith & Co.; that is to say, it was a mark invented by the three for the business in which they were respectively interested. That is the only fact that we have got before us from which we are to deduce the rights of the parties. Such a mark was introduced and used, and continued to be used until the failure of Galbraith & Co., 498] when the *transactions, as far as they were concerned, came to an end; and then, by reason of a quarrel or a difference between Ward and Robinson, Ward ceased to employ Robinson, and employed somebody else.

In my opinion, under those circumstances, it is impossible to say that either Ward acquired a monopoly of that trade-mark against Robinson, or that Robinson had a monopoly of it against Ward. Suppose Ward had sent out the goods for twenty years to Rangoon in this way, and that the goods had acquired a very great reputation in the market, such as that of the old East India Company's marks, that is to say, such a reputation that persons seeing

these marks on goods would not think it worth while to examine either the quantity or the quality of the goods, and that then Robinson was minded to throw up the undertaking, or died, or transferred his business to somebody else, would Ward lose his right of continuing to have his goods marked in exactly the same way as they had been marked before with the consent and privity of Robinson himself? I cannot believe that it was the intention of the parties that such a consequence should be the result of the transactions between them.

On the other hand, suppose that after these marks had been arranged and applied, Ward within a short time determined to have no further connection with Robinson, in that case it would be equally unreasonable to suppose that Robinson was parting with the right to use his own crest or coat-of-arms, or name, or the combination of figures of which, at all events, he was one of the co-designers or co-inventors. The result is this: the case is not like one depending on the relation of master and servant, or principal and agent, but it is more like a partnership; that is to say, the mark was adopted by persons joined in a matter in which they were interested jointly, not as master and servant, but by way of a partnership. The *onus probandi* is thrown upon the plaintiff in each case to prove that he has that monopoly and sole right which he alleges to use the marks or combination of marks, and that the defendant is unlawfully using the same. Each plaintiff has, to my mind, entirely failed to discharge that *onus*, and the result is that each action ought, in my opinion, to be dismissed with costs. But to avoid complication it will be best that both actions should *be simply dismissed, without making any order as [499 to costs here or below.

BAGGALLAY, L.J.: As regards the judgment of the Vice-Chancellor granting the injunction in *Robinson v. Finlay*, I think it is important to bear in mind that Robinson's claim was only for the combination of the several portions of the design placed upon the calico and not for the individual portions, and although he claims that certain portions of the design, for instance, the crest and the shield, have been his trade-marks upon previous occasions, there is no suggestion that goods are known in Burmah by reason of the crest or coat-of-arms being placed upon them. The allegation is, that the goods are recognized in Burmah by reason of the whole design being there. Therefore we have not now to consider whether Robinson would have had a title in respect of the portions of the trade-mark which were his before the year

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1870, or any of them, but whether he has a property in the whole design which will entitle him to have an injunction.

I think we have only to turn to the admitted facts of the case to see that it is impossible to hold that any one of the three parties interested in the adventure, for the purpose of which the design was adopted, can claim to be entitled to that design when the adventure is put an end to. We have this fact: that Ward shipped goods to Burmah, consigning them to Galbraith & Co. and shipping them through Robinson & Co. Then, in order that the goods might be known in Burmah, a mark was adopted composed of what I may call elements representing each of the three several parties. As regards two of the parties, there does not appear to be any question that they are represented. The crest and the stag, and the Robinson shield, and the words "Superior Manufacture, George Robinson & Co., Manchester," all represent what I may call the Robinson element in the design. Equally so does the white elephant ticket, which was an old design of Galbraith in Burmah, represent the Galbraith element; and it is suggested, but not proved, that certain figures in the design, namely, the range of figures from 000 up to 999, represent the Ward element. We have then a particular design for the purpose of giving a 500] *character to goods, in the export of which the several parties are interested, and that particular design contains something which represents the interest more or less which each of the three several parties has in the goods so exported. It may be a very good design so long as the purpose for which it was invented continues to be effectuated, but when the parties cease to carry on this particular adventure, I am at a loss to understand upon what ground it can be said that that design has become the property of any one of the three parties concerned who were using it. It appears to me, therefore, that Robinson has no exclusive title to this design; and it being clear upon the evidence that the designs were designs in which three persons were interested for the purpose of carrying on a business or adventure in which all three were interested, it follows that, upon the termination of that adventure, none of the three could claim any title against the other, and that Ward's action must fail, as well as that of Robinson.

BRAMWELL, L.J.: I am of the same opinion. The facts really are not in dispute, but it is important to bear them clearly in mind in order to understand how the case ought to be dealt with. Mr. Ward was a manufacturer, and was minded to be an exporter. He accordingly arranged with

Galbraith that he would export certain goods to Rangoon consigned to Galbraith & Co., to be sold by them for him. The contract arising out of the consignment was wholly and entirely between Galbraith and Ward. Robinson's share in the matter was this: Ward required somebody to manage that part of the business which had to be done after the goods left his manufactory, or, if they were not his own goods, the manufactory of the person of whom he bought them. They had to be bleached and undergo a variety of operations, and all those things were to be done by Messrs. Galbraith. They had a house in Glasgow, and they were to do this, but not through the agency of their Glasgow house apparently, but through the agency of Robinson. There was no relation of any kind between Robinson and Ward. There were no circumstances under which one can imagine that Robinson would have had a right of action against Ward, or Ward a right of action against Robinson. If the bleaching or shipping, or any *other thing was [501 not properly attended to, Ward's remedy would have been against Galbraith, and Galbraith's remedy would have been over against Robinson. It seems to me, with very great respect to the Vice-Chancellor, that he has not thoroughly appreciated this point, but has supposed that Robinson was in some way principal exporter of these goods, which to my mind he most clearly was not. Robinson did not export. The thing was not done at his risk. It was no venture of his, and he gained no profit out of it except the 1 per cent. which Galbraith was to pay to him. The claim of Mr. Robinson to the trade-mark is to my mind the strangest claim to a trade-mark that ever was heard of. It comes really to this: "I am a shipping agent, I am not a manufacturer, I am not a merchant adventurer, I am not a person who has selected or chosen these goods, and who has sent them out at my risk, and for my profit, or for my loss." All he says is, "I am the commission agent, or commission merchant, if the word commission agent is not an acceptable one, through whom the exporter, who is doing it at his risk and for his profit, is exporting these goods." It seems to me that such a person as that exercises no judgment upon the matter at all. He gives no character to the goods in any way, and with great submission to the learned Vice-Chancellor, I doubt very much whether he was correct in thinking that Robinson's mark showed that he had exercised his judgment on the goods. I doubt whether Mr. Robinson had a right to say, "I will not send this particular parcel of goods out because I do not like them." The

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answer would have been, "What voice have you in the matter?" It seems to me that this is in no way a trade-mark. It seems to me it is very little more of a trade-mark than if upon goods always going out by the Peninsular and Oriental Company's steamers there was stamped outside of the bale "P. & O."

It seems to me, therefore, with great submission to the learned Vice Chancellor, that what I cannot help calling the error is in supposing that this is Robinson's business, in which Robinson's character is in any way pledged, and in which the mark is an indication of some responsibility on the part of Robinson. Nothing of that sort, to my mind, exists. But, supposing that it were so, is Ward deprived 502] of the right to use a distinctive trade-mark such *as that which he is now claiming? It seems to me to be strange to say that he is. The goods are mainly of his own manufacture, but if they are not all his manufacture, they are of his manufacture or selection, and he sends them out for his own profit or loss. He is the merchant adventurer. They had a particular trade-mark upon them lawfully at the time; they go out and they are sold possibly for twenty years, and gain a reputation, because the trade-mark is known as an indication either that the goods are of the same manufacture, or that they have been selected by the same person who has selected and arranged and sent out on his own risk that form of goods with that trade-mark upon them. Suppose Mr. Robinson had retired from business, or ceased to act with Galbraith, could he have put an end to the use of the trade-mark by Mr. Ward? I think it is impossible that he could. It was suggested in the argument what would be the case if Messrs. Gilbey sold wine for a considerable time for a particular person, could he use their trade-mark? I think the answer is a tolerably obvious one. If they sold their wine without reference, as I think they do, to its having been grown by any particular person, the wine of that particular person would have gained no particular reputation as being sold by Messrs. Gilbey, and he would not be entitled in any way to use their trade-mark; but, supposing Gibeys were unwise enough to sell a particular wine and earmark it in some way, applying a particular trade-mark to it, and describing it in such a way that that portion of their sales got a special renown independently of Messrs. Gilbey themselves, and they chose to sell it no longer, I should doubt very much whether the grower of the wine would not be entitled to use all the marks which had designated those wines with their trade-

mark over it. It seems to me that the proper conclusion in this case is that Ward has a right to use the marks.

Then with respect to the other question, as to whether Ward is entitled to prevent Messrs. Robinson from using the trade-mark which they use, I feel considerable difficulty, but I think that he is not, and pretty much for the same reasons for which I think that Robinson cannot prevent his using it. I cannot think that when this arrangement was come to Robinson forever gave up the use of his own coat-of-arms, and his own crest, and of *the white ele- [503 phant used before, more especially when I remember that when this trade-mark was first used by Mr. Ward it was used in conjunction with Robinson's name. It seems to me, therefore, that the right way to look at the two cases upon the whole is this, that here was a compound matter which the parties agreed to, and upon coming to the arrangement which they did come to, they made no provision as to what should happen when that arrangement ceased to exist between them, and the consequence is that each party must stand upon what one may call his natural rights under the circumstances, that is to say, that each may do what he is not forbidden to do.

Solicitors: *Milne, Riddle & Mellor; Johnsons, Upton & Co.*

[9 Chancery Division, 503.]

Fry, J., July 19, 20, 21, 23, 1877. C.A., July 16, 20, 23, 26, 29, 1878.

NITRO-PHOSPHATE AND ODAM'S CHEMICAL MANURE COMPANY V. LONDON AND ST. KATHARINE DOCK COMPANY.

[1876 N. 30.]

Negligence—Damage—Injunction—Act of God—Extraordinary Flood—Overflow of Water from Dock—Company—Statutory Powers—Failure to fulfil Statutory Obligation—Apportionment of Damage.

In order that an extraordinary natural event, such as a very high tide, should be, in the legal sense of the words, an act of God, it is not necessary that such an event should never have happened before; it is sufficient that its happening could not have been reasonably expected. If such an event has happened once, but there is nothing to lead to the inference that it is likely to recur, it does not, if it happens a second time, cease to be an act of God.

Where a defendant charged with negligence has been guilty of a breach of duty sufficient to produce the damage complained of, he cannot escape liability by showing that the same damage would have arisen from some other cause beyond his control if he had done his duty. But if he can show that some of the damage which actually happened arose from a cause beyond his control, the liability for damage will be apportioned.

A dock company were authorized by their special act to make and maintain a

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* dock and works connected therewith according to the levels defined in certain plans and sections deposited with the clerk of the peace. The dock communicated with the River Thames by an artificial channel, through which the water was admitted. The sections showed the retaining bank of the dock and channel at an uniform height of four feet above Trinity high-water mark. The level of the surrounding country 504] was some feet below Trinity high-water *mark, the river being kept from overflowing by means of a river wall 4 ft. 2 in. above Trinity high-water mark. The company allowed their retaining bank to be at one point several inches below the level of four feet. In November, 1875, an extraordinarily high tide took place, and the river rose to 4 ft. 5 in. above Trinity high-water mark, in consequence of which the water in the dock overflowed the bank and damaged the property of a neighboring landowner. The tide had never been known to rise so high before, but in March, 1874, it had risen to four feet above Trinity high-water mark. On that occasion there was a small overflow from the dock, but no damage was done to the neighboring landowner. Previously to that the tide had never risen above 3 ft. 4 in., and the water had never overflowed from the dock:

Held, first, on the construction of the act, that the company were bound to keep their bank up to the level of four feet above Trinity high-water mark, and were liable to the plaintiffs for breach of their statutory duty in not doing so:

Secondly, that, independently of the act, the defendants were bound as riparian owners to keep the bank up to the level of 4 ft. 2 in., the height of the rest of the river wall, and that they were liable to the plaintiffs for negligence in not doing so:

Thirdly, that the extraordinary high tide of November, 1875, although an act of God, did not excuse the defendants from their liability; but that they ought to have an opportunity of showing that the damage done by the act of God and the damage done through their negligence ought to be apportioned.

The decision of Fry, J., affirmed with a variation.

THIS was an action to recover damages for an injury caused to the plaintiffs' works and property by an overflow of water from the defendants' dock, which, as the plaintiffs alleged, resulted from the defendants' negligence in not having maintained the retaining wall of their dock, called the Victoria Dock, at a sufficient height.

The plaintiffs were the owners of a manufactory for chemical manures, situate at Plaistow, in Essex. The defendants were the owners of the Victoria Dock, which nearly adjoined the premises of the plaintiffs. The Dock was approached from the river by a narrow artificial channel and an artificial tidal basin, through which the water was admitted into the dock. The entrance gates of the channel were so constructed as to admit and retain the water of the river, and as the tide rose the water flowed from the river through the channel into the tidal basin. The natural level of the land on which the plaintiffs' premises were situate and on which the defendants' dock was constructed was some seven or eight feet below Trinity high-water mark, and the water of 505] the river was kept from *overflowing the whole of the district by means of a river wall. The district was subject to the jurisdiction of the Dagenham and Havering Commissioners, who, prior to November, 1875, required the owners of land fronting the river to maintain the river wall at a height of 4 ft. 2 in. above Trinity high-water mark. On the

20th of March, 1874, there was a very high tide in the river Thames. The water then rose at London Bridge to a height of 4 ft. 3½ in. above Trinity high-water mark. This was the highest tide which had been up to that time recorded in the river. The highest tide previously recorded since the year 1852 was in March, 1869, when the water rose 3 ft. 7 in. above Trinity high-water mark at London Bridge. On the 20th of March, 1874, a small quantity of water overflowed the retaining bank of the defendants' entrance channel and basin and found its way into the plaintiffs' premises. The plaintiffs then gave notice to the defendants that they should hold them liable for the damage thus caused. The defendants, however, repudiated their liability, and no steps were taken to enforce the claim. In April, 1874, when another high tide was anticipated, the defendants placed some clay on the top of their bank, but this was only a temporary addition to its height, and was not maintained afterwards. No tide of equal height occurred again, and no further overflow of water from the defendants' channel or basin took place before November, 1875. Early in the morning (about 2.30 A.M.) of the 15th of November, 1875, there was again an extraordinarily high tide in the Thames. The water then rose at London Bridge to a height of 4 ft. 6 in. above Trinity high-water mark. It rose to 4 ft. 5 in. at the Victoria Dock, and there was a general overflow of the river in that district. A large quantity of water found its way into the plaintiffs' premises and caused considerable damage to their works and stock-in-trade. This water, as the plaintiffs alleged, was water which overflowed the bank of the defendants' entrance channel and tidal basin at the same place where the overflow had occurred in March, 1874. The plaintiffs alleged that the defendants were liable for negligence in not keeping their bank at a proper height so as to prevent the overflow of the water at high tides, and they claimed damages to the amount of £7,000, and an injunction to restrain the defendants from permitting any further overflow of water into the plaintiffs' premises.

*By their statement of defence the defendants de- [506
nied that the water which had caused the damage to the plaintiffs had come from their premises. They also denied their liability if the water had come from their premises. They asserted that they had not been guilty of any negligence, and in particular that the high tide of the 15th of November, 1875, was an act of God, against which they were not bound in any case to protect the plaintiffs.

The Victoria Dock was constructed by a company called

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the Victoria (London) Dock Company, which was incorporated under that name by an act (13 & 14 Vict. c. LI), passed in 1850. By the Victoria (London) Docks Act, 1853 (16 & 17 Vict. c. cxxxr), the Act of 1850 was repealed, but (by sect. 4) it was provided that, notwithstanding the repeal, the company should for the purposes of the act remain as from the passing of the act of 1850, and continue incorporated by the name of The Victoria (London) Dock Company, "with power to make and maintain docks and works, with all proper works and conveniences connected therewith, and to purchase, take, hold, and dispose of lands and other property for the purposes and within the restrictions of this act and of the acts incorporated herewith." By sect. 3 the Companies Clauses Consolidation Act, 1845, the Lands Clauses Consolidation Act, 1845, and the Harbors, Docks, and Piers Clauses Act, 1847, were incorporated with the special act. Sect. 22 provided as follows: "And whereas a plan and sections of the dock authorized to be made by the said recited act, and therein described as the intended dock, and of the works connected therewith, showing the situation and levels thereof respectively, and the limits within which the same are to be constructed, and also a book of reference containing the names of the owners, lessees, and occupiers of the lands upon or through which the same are intended to be made, were previously to the passing of the said act, and in the month of November, 1849, deposited with the respective clerks of the peace for the counties of Essex and Kent: Be it enacted, that, subject to the provisions in this and the said incorporated acts contained, and to the powers of deviation, alteration, and enlargement herein and in the said incorporated acts contained, it shall be lawful for the said company to continue, make, complete, and maintain the said dock and the works which were authorized by the said act hereby repealed in the situation and upon the lands delineated upon the said plans and con- 507] tained *in the said book of reference, and according to the levels defined on the said sections." Sect. 23 empowered the company, subject to the provisions of the special act and of the acts incorporated therewith, to alter, vary, and enlarge the dock and works authorized by the act of 1850, and to make and maintain additional docks and other works connected therewith; and sect. 24 provided: "Whereas plans and sections of the additional docks, enlargements, alterations, and works herein authorized to be made, and also books of reference to such plans, containing the names of the owners or reputed owners, lessees or re-

puted lessees and occupiers of the lands in, upon, or through which the same works are intended to pass or be made, have been deposited with the clerks of the peace for the counties of Essex and Kent: Therefore, subject to the provisions in this and the said incorporated acts, and to the powers of deviation in this act contained, it shall be lawful for the company to make or maintain the said additional docks, enlargements, alterations, and other works upon the lands delineated on the said plans and described in the said book of reference, and according to the levels defined on the sections."

The deposited sections (though their effect was the subject of conflicting evidence) showed, in the opinion of the court, the retaining bank of the entrance channel and tidal basin at an uniform level of four feet above Trinity high-water mark. The dock and works were completed in 1855.

By the London and St. Katharine Docks Act, 1864 (27 & 28 Vict. c. CLXXVIII), the London Dock Company and the St. Katharine Dock Company were amalgamated into one company by the name of The London and St. Katharine Docks Company, and the transfer to that company and the amalgamation with their undertaking and docks of the undertaking and docks of the Victoria (London) Dock Company were authorized. Sect. 57 confirmed several agreements for this transfer and amalgamation which had been previously entered into between the Victoria Company and the London and St. Katharine Companies. Sect. 58 enacted that the transfer and amalgamation should take place in accordance with those agreements. Sect. 59 provided that "the Victoria Docks, by this act transferred to and vested in the amalgamated company, are so transferred to and vested in them subject to the payment, satisfaction, or discharge by the amalgamated company of the *whole [508 of the debts, liabilities, and engagements of the Victoria Company as they shall be and exist on the transfer and amalgamation taking effect, and subject also to the several statutory obligations relating to the Victoria Docks which appear by the several sections and provisions of the recited acts relating to the Victoria Dock Company, which are set forth in part 3 of the 4th schedule to this act annexed, and the amalgamated company's obligations under this act with respect to the Victoria Docks." By sect. 60: "From and after the transfer and amalgamation, and except only as is by this act otherwise provided, the amalgamated company shall with respect to the Victoria Docks and all matters

connected therewith represent the Victoria Dock Company as if that company and the amalgamated company had originally been, and had continued without intermission to be, one and the same body corporate." Sect. 61 provided that, on the transfer and amalgamation taking effect, the Victoria (London) Docks Act, 1853, should be repealed, but sect. 62 provided that, notwithstanding that repeal, the several sections and provisions of that act which were set forth in part 3 of the 4th schedule to the amalgamating act should, so far as the same were at the time of the transfer and amalgamation in force, remain in full force. The sections of the act of 1853 which are above referred to were not included in the 4th schedule to the amalgamating act. Sect. 64, however, provided that, notwithstanding the repeal of the act of 1853 and other acts relating to the Victoria Dock Company, "everything before the repeal thereof done, suffered, and confirmed under or by any of those acts shall be as valid as if the repeal thereof had not happened, and the repeal thereof and the operation of this act respectively shall accordingly be subject and without prejudice to any and everything so done, suffered, and confirmed respectively, and to all rights, liabilities, claims and demands, both present and future, which, if the repeal had not happened, would be incident to or consequent on any and everything so done, suffered, and confirmed respectively; and with respect to all such things so done, suffered, and confirmed respectively, and all such rights, liabilities, claims and demands, the amalgamated company shall to all intents represent the Victoria Dock Company, provided that the generality of this provision shall not be restricted by any of the other provisions of this act." And by sect. 67, "Notwithstanding *the repeal of those acts, all plans and books of reference . . . respectively deposited for the purposes of any of those acts with any clerk of the peace, shall remain in his custody as if they were deposited for the purposes of this act." Sect. 92 provided that "The amalgamated company shall maintain, manage, regulate, work, and use the London Docks and the St. Katharine Docks respectively, subject to all statutory duties, obligations, and liabilities to which the London Dock Company and the St. Katharine Dock Company and the Victoria Dock Company, and their lessees respectively, immediately before the passing of this act were, or but for this act would be, subject in respect of the London and St. Katharine Docks and Victoria Docks respectively."

The action came on for trial before Mr. Justice Fry on the 19th of July, 1877.

The evidence proved, in the opinion of the court, that the water which caused the damage to the plaintiffs came from the defendants' dock, and that the defendants' retaining bank was, on the 15th of November, 1875, for some distance from six to ten inches below the height of four feet above Trinity high-water mark.

It was also proved that, with the exception of the overflow in March, 1874, the water had never overflowed the defendants' retaining wall from the time when it was first constructed until November, 1875. Mr. C. J. More, the assistant engineer to the Thames Conservancy Board, proved, from a register of tides kept by them at London Bridge, that, commencing with the year 1868, the tides there exceeding three feet above Trinity high-water mark were as follows:—

8th February, 1868	3 ft. 5 in.
1st March, 1869	3 ft. 7 in.
3d November, 1869	3 ft. 1½ in.
27th February, 1873	3 ft. 6 in.
20th March, 1874	4 ft. 3½ in.
15th November, 1875	4 ft. 6 in.
2d January, 1877 (morning)	3 ft. 8 in.
“ “ (evening)	3 ft. 11½ in.
31st January, 1877	3 ft. 4 in.

It was also proved that the tides at the Victoria Dock were *generally from two to eight inches lower than those [510 at London Bridge, and that the rise of the water is much slower at the latter part than at the earlier part of the rise. The openings in the walls of the embankments on the north and south sides of the Thames, constructed by the Metropolitan Board of Works, were originally required to be constructed at a level of four feet above Trinity high-water mark, but after the tide of November, 1875, sills six inches high were placed in those openings. After that tide, also, the Dagenham and Havering Commissioners required the frontagers in their district to raise the river wall to five feet above Trinity high-water mark.

Sir Henry James, Q.C., Chitty, Q.C., North, Q.C., and Rigby, for the plaintiffs: The defendants were bound by their private acts to keep their bank at any rate as high as four feet above Trinity high-water mark. That is clear from the deposited plans and sections. The defendants are subject to all the liabilities of the original Victoria Dock Com-

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pany: *Ecclesiastical Commissioners for England v. North Eastern Railway Company* (').

But the defendants were bound to do more than that. They were bound to take proper precautions to prevent any overflow which might result from any tide which might reasonably have been expected. This tide of November, 1875, was only a few inches higher than that of March, 1874. That tide should have operated as a warning, and should have led the defendants to expect even higher tides. It cannot be said that the tide of November, 1875, was an act of God in the legal sense of the term. It was not so unprecedented that it can be said that it could not reasonably have been anticipated. The defendants brought the water there for their own purposes, and must keep it in at their peril: *Rylands v. Fletcher* ('). They may be excused if mischief results from the act of God: *Nichols v. Marsland* ('). But in the present case there is no such excuse. A tide three inches higher than a previous one cannot be called an act of God. If an extraordinary flood happens 511] once, the defendants are bound to provide *against such a flood for the future. These very high tides happen very seldom, but it may be assumed that what has once happened may happen again. This is not the case of a great tidal wave like that which rose on the occasion of the earthquake of Lisbon, but a small increase of three inches above the tide of March, 1874.

[FRY, J., referred to *Rex v. Commissioners of Sewers for the Western Division of the County of Somerset* (').]

But, even if this tide can be properly called an act of God, the defendants cannot avail themselves of that excuse. They have not kept up their bank to the height which their act prescribed, and it is a condition precedent to their pleading the act of God that they should themselves have done all that they were bound to do. At any rate, they are bound to show that if their bank had been kept up to four feet we should have been damaged to the same extent as we have been. This it is impossible for them to do. If they had kept the bank up to four feet, a much less quantity of water would have flowed over, and it would not have begun to flow over so soon. There would have been a much longer time for us to make preparations for keeping the water out.

Persons who have parliamentary powers must still use

(') 4 Ch. D., 845.

(*) Law Rep., 10 Ex., 255; 14 Eng. R.,

(*) Law Rep., 3 H. L., 330, 339. 538; 2 Ex. D., 1; 19 Eng. R., 335.

(*) 8 T. R., 312.

ordinary precautions: *Vaughan v. Taff Vale Railway Company* (').

[FRY, J., referred to *Rex v. Pease* (').]

In *Jones v. Festiniog Railway Company* (') the defendants were held liable for damage done by fire from their locomotive engine, because they had no express statutory power to use locomotive engines, although there was no negligence on their part. And in *Lawrence v. Great Northern Railway Company* (') the defendant company were held liable for not having done something more than they were expressly required by their act to do. Here the defendants have not done what their act required them to do, they have not kept up their bank to four feet, therefore they are liable. They have not complied with the condition precedent imposed by the act, and they cannot therefore avail themselves of the defence that the act empowered them to make the dock. They are thrown back on their common law liability, and *Rylands v. Fletcher* (') applies; and they cannot avail themselves of the defence that the extraordinary tide was an act of God, because they have not fulfilled their statutory obligation.

Benjamin, Q.C., Murphy, Q.C., Davey, Q.C., and Crossley, for the defendants: The question is whether, assuming that there has been negligence on the part of the defendants, there is any legal principle by virtue of which they are liable for that negligence when, if they had taken the precautions they ought to have taken, those precautions would, by reason of an act of God, have been unavailing to prevent the damage?

At common law a "frontager," or owner of land abutting on the sea or a river, is under no obligation to keep up a sea or river wall for the benefit of his neighbor: *Hudson v. Tabor* ('). This shows that the plaintiffs ought to have taken reasonable care to protect themselves. Then, again (except in the case of contract), a man is only responsible for his own negligence and the result of it; not for the act of God or its results. So far as the damage in the present case resulted from the act of God, we are not responsible for it. If we had taken reasonable precautions there would still have been an overflow; we cannot be responsible for that, and equal damage would have resulted to the plaintiffs. The act of God was the proximate cause of the dam-

(') 5 H. & N., 679.

(') 4 B. & Ad., 30.

(') Law Rep., 3 Q. B., 733.

(') 16 Q. B., 643.

(') Law Rep., 3 H. L., 330.

(') 1 Q. B. D., 225; 16 Eng. R., 210;

2 Q. B. D., 290; 20 Eng. R., 350.

age, and we are not responsible for that. There never was any overflow from our dock before March, 1874, and it could not have been reasonably anticipated that such a high tide as that would recur. The act of God begins at that point in the operation of natural causes when that happens which goes beyond what any reasonable or prudent man might have anticipated. *Nichols v. Marsland* (*) is an illustration of this.

If we are liable at all, we can only be held liable for so much of the damage as has been occasioned by our fault. In *Workman v. Great Northern Railway Company* (*), the 513] court distinguished *between the damage which resulted from the defendants' negligence, and that which would have resulted if they had performed their obligation, and only held them liable for the former. In consequence of the defendants' embankment the plaintiff's land, which would have been flooded to a certain extent if the embankment had not existed, was flooded to a greater extent, and it was held that the defendants were liable only for the difference between the amount of damage actually done to the plaintiff and that which would have been done if there had been no embankment. The damages were apportioned on the principle that the defendants were liable only for the damage which directly resulted from their negligence, and not for that which was due to other causes operating at the same time. It is true that there was no act of God in that case, but it recognizes the apportionment of the damages, and shows that, however difficult it may be to distribute the damage, the defendant cannot be charged with the damage due to other causes than his negligence, such as the act of God.

[FRY, J.: In *Keighley's Case* (*), and in all the other reported cases, so far as I know, in which the act of God has been admitted as an excuse, the defendant had himself done all that he was bound to do.]

No doubt that would generally be so, and the present case raises a new point. But the principle is this—a man is liable only for the consequence of his own negligence, and not for the injuries resulting from another cause operating at the same time. There is no condition precedent that he who pleads the act of God shall not have been guilty of any negligence himself. If it is impossible to distribute the damages, the defendants ought not to be held liable at all. In

(*) Law Rep., 10 Ex., 255; 14 Eng. R., 538; 2 Ex. D., 1; 19 Eng. R., 335.

(*) 32 L. J. (Q.B.), 279.

(*) 10 Rep., 139 a.

Smith v. Fletcher ⁽¹⁾ the court took a distinction between water flowing into the plaintiffs' mine naturally and water brought there by the act of the defendants.

The high tide of November, 1875, was an act of God. Because an extraordinary event has happened once, it does not follow that if it recurs it is not then equally an act of God. Unless it has happened several times it cannot reasonably be expected to recur. No such tide as that of March, 1874, had ever been known before; *none [514 like it happened for many months afterwards, and the defendants had a right to assume that it would not recur, and were not bound to provide against it, especially considering that no damage worth speaking of was done to the plaintiffs in March, 1874. And, though it is shown that the tides at London Bridge rise several inches higher than at our docks, the level of the openings in the Thames embankment between Westminster and Blackfriars bridges was, prior to 1874, fixed by the most competent engineers at four feet above Trinity high-water mark. Since November, 1875, they have placed sills six inches deep in the openings. And in the same way the Dagenham Commissioners have, since November, 1875, required the river wall protecting their district to be raised to five feet. The right conclusion is that the tide of November, 1875, could not have been reasonably anticipated, in other words, that it was an act of God in the legal sense of the words.

Moreover, the evidence shows that there was a general overflow of the river in this district, a common public calamity. It is impossible to distinguish between the water which came from us to the plaintiffs and that which came to them from other sources, and for this reason also we ought not to be held liable in damages: *St. Helen's Smelting Company v. Tipping* ⁽²⁾.

On the construction of their acts of Parliament there is no obligation upon the defendants to keep their bank up to an uniform level of four feet, and never for a moment to allow it to become any lower. The act certainly does not impose any such liability in express terms, and even if the deposited plans and sections are to be imported, they do not show any such level as four feet. The plaintiffs' own skilled witnesses differ as to the meaning of the sections. At any rate, there is no hard and fast level of four feet for the entire extent of the dock. The only obligation is to do

⁽¹⁾ Law Rep., 7 Ex., 805; 3 Eng. R., 422; Law Rep., 9 Ex., 64; 8 Eng. R., 510.

⁽²⁾ 11 H. L. C., 642.

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what is reasonable. The doctrine of *Rylands v. Fletcher* (') does not apply, because we are acting under parliamentary powers. We are only bound to take reasonable precautions, and the experience of years shows that we have done this. Such a tide as that of November, 1875, could not reasonably have been anticipated.

515] *FRY, J., after stating the facts of the case, and his conclusion upon the evidence that the damage caused to the plaintiffs' premises was caused exclusively by water which came from the defendants' docks, and that on the 15th of November, 1875, the crown of the defendants' retaining bank was to a very serious extent below four feet above Trinity high-water mark, continued :

Now that being the state of things, this question arises, Was there or was there not negligence on the part of the defendants? The facts which bear upon that question are shortly these: Before November, 1875, the Dagenham and Havering Commissioners required the river wall of the Thames to be maintained at a level of 4 ft. 2 in. above Trinity high-water mark. The openings in the walls of the Thames embankments were originally required to be constructed at a height of four feet above Trinity high-water mark. That would rather imply that the defendants were negligent in leaving their bank below four feet. But against that I am bound to set this fact, that from the end of the year 1855, when their docks were opened, down to March, 1874, not a drop of water had ever passed over their bank. I should therefore have had great difficulty in coming to the conclusion that there was any common law liability for negligence on the part of the defendants, subject, however, to the question whether the fact that water did flow over the bank in March, 1874, created such a liability. It has been argued for the plaintiffs that that fact was in effect notice to the defendants that they might expect a tide as high as four feet to happen again, although such an event had never been known to have happened in the history of the world before March, 1874; and it is said that, after the tide had once reached four feet, a tide which reached that height again could never be said to be so unusual or unexpected as to be deemed an act of God in the legal sense of the words. I do not think that view is correct. I do not think that the mere fact that a phenomenon has happened once, when it does not carry with it or import any probability of a recurrence—when, in other words, it does not imply any law from which its recurrence can be inferred—places that phe-

(') Law Rep., 3 H. L., 330, 339.

nomenon out of the operation of the rule of law with regard to the act of God. In order that the phenomenon should fall within that rule it is not, in my opinion, necessary that *it should be unique, that it should hap- [516 pen for the first time; it is enough that it is extraordinary, and such as could not reasonably be anticipated. That appears to me to be the view which has been taken in all the cases, and notably by Lord Justice Mellish in the recent case of *Nichols v. Marsland* ('). He says, speaking of the flood which had occurred there, "The jury have distinctly found, not only that there was no negligence in the construction or the maintenance of the reservoirs, but that the flood was so great that it could not reasonably have been anticipated, although, if it had been anticipated, the effect might have been prevented; and this seems to us in substance a finding that the escape of the water was owing to the act of God." Pausing there, it may be observed, that to say that a thing could not reasonably have been anticipated is to say that it is the act of God. He then proceeds: "However great the flood had been, if it had not been greater than floods that had happened before and might be expected to occur again, the defendant might not have made out that she was free from fault." Therefore, I think that, if the case had stood simply on the common law liability of the defendants for negligence, I should have had great difficulty in concluding that there was any such liability, the flood of November, 1875, being, in my judgment, what, in the contemplation of law, is called an act of God.

But I do not think that this case is to be determined upon the defendants' common law liability, and for this reason: The defendants did not choose to rely on their common law right to use their land as they might think fit. They chose to go to Parliament for powers to authorize them to some extent apparently to do what they might have done without those powers. They take a power to construct and to maintain a dock upon their land, and, taking that power and acting upon it, they must, in my judgment, subject themselves to the conditions which Parliament has imposed upon the exercise of that power. They cannot afterwards fall back upon the question of what was reasonable care, if Parliament have in any particular respect laid down what they are to do. The question, therefore, which I have to determine comes, in my opinion, to this, Have Parliament laid down anything which takes *the place of the com- [517 mon law liability to use reasonable care? have they, in

(') 2 Ex. D., 5; 19 Eng. Rep., 336.

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short, defined the height at which the bank of the dock is to be maintained? If they have, I do not think that the defendants can say, We will be judged by our own common law liability or by our statutory liability, as we may think fit. To allow them to do so would obviously be unfair, for this reason, that if they perform their statutory obligation they are harmless in all cases, even if that liability is less than the common law liability; whereas, if they perform even less than the statutory obligation, they might contend that, if the common law obligation reached to a less extent, they would be harmless also. I think they must stand or fall by their statutory liability. In some cases this will enure to their benefit, in other cases it will enure to their injury. But, whether it be for or against them, it becomes, in my opinion, the rule by which their negligence or care is to be tried. I therefore turn to the act of 1853. [His Lordship referred to the provisions of the act and to the deposited plans and sections, and continued:]

I hold, therefore, that the statute imposed on the defendant company an obligation to maintain the upper surface of the bank which was to retain the water in their dock at a level of four feet above Trinity high-water mark. It is conceded that they did not so maintain it. The result, in my opinion, is, that there has been negligence on their part in not fulfilling their statutory obligation, and that they are responsible for that negligence.

But then it is said, "That may be so as to part of the overflow, but on the morning of the 15th of November the water rose five inches above the four feet, and we claim the benefit of the provisions of the statute, and say that we are not liable for that five inches, and for aught that appears, that five inches would have done as much damage to the plaintiffs as the eight or ten inches, which flowed over by reason of our bank being below the level of four feet." It must be borne in mind that I cannot ascertain precisely what the actual depth of the water which rose over the defendants' bank was, though I have no doubt in my own mind, from the evidence before me, that, of the entire depth of water which passed over the defendants' bank, by far the greater portion passed over before the four feet was 518] reached by the tidal water. *The defendants say, "We are exonerated from the five inches of rise above the four feet." How do the plaintiffs meet that? They say, "You are relying upon the act of God, and no man who has a duty cast upon him, and who does not perform that duty, can rely upon the act of God as any excuse at all.

It is a condition precedent to pleading the act of God, or getting the benefit of the act of God, that you who seek the benefit of it shall have done everything which it is your duty to do." Now there is, as it seems to me, great force in that contention, and for this reason, that, if the defendants had done their duty, the exact experiment would have been tried which was requisite in order to see what damage would have followed to the plaintiffs from the act of God. Whereas the defendants, by not doing their duty, have, if they are right, compelled the court to try a much more difficult question, viz., what would have been the result of the experiment which they did not choose to try. In the one case the question would have been, What has actually happened? in the other case it is, What would have happened in a state of circumstances different from that which actually existed? and I need hardly say that the second is a much more difficult question to answer than the first.

Furthermore, there is, as it seems to me, much authority in favor of the plaintiffs' view. Going back to *Keighley's Case* (*), where it was held that a rate might be made upon the whole of a district for the purpose of repairing a sea-wall which the frontager was liable to repair, it is put in this way, that "if one who is bound by prescription to repair a wall *contra fluxum maris*, and he keeps the wall in good repair, and of such height, and as sufficient as it was accustomed; and by the sudden and unusual increase of water, salt or fresh, the walls are broken, or the water overflows the walls," then a rate may be made on the whole district for the repair of the wall:—that is to say, that, if the person who is under the obligation does his duty and there is nevertheless an act of God which destroys the wall, he is not liable. And again in *Nichols v. Marsland* (*), the question was put to the jury whether there had or had not in fact been negligence on the part of the defendants. It seems to me that that would have been *an im- [519 proper question to put to the jury if it had been sufficient for the defendant to say, "Whether I did or did not do my duty I can rely on the act of God."

However, it does not appear to me necessary to decide this point, because I am clear that a defendant cannot avail himself of the act of God as an excuse when he has not done his own duty, except in cases in which he can make it apparent and plain to the court that, if he had done his duty, damage would still have followed to the plaintiffs. Now

(*) 10 Rep., 189 a.

26 ENG. REP.

(*) 2 Ex. D., 1; 19 Eng. R., 335.

that burthen the defendants have, in my opinion, not discharged in the present case. I cannot tell what the effect of the water was before the tide reached four feet, except that I do know that it is in the nature of running water to make a way for itself, and, beginning therefore to flow, it would cut its own channel and keep that channel open as long as there was any supply of water. I cannot tell how far the means which were at the disposal of the plaintiffs would have been sufficient to keep out the five inches of water above four feet, if it had ever reached their premises. I cannot tell whether it would have reached their premises. Furthermore, it is to be borne in mind that the evidence before me is distinct that, during the last two or three inches of rise of the tide, the rise would have been much more slow and gradual than during the earlier portion of the flow. Moreover, the flow would have begun at a much later period of the night, and the gangs of men in the plaintiffs' service were coming in during that time, so that the plaintiffs might have been in a much better condition to meet the smaller influx of water. Therefore, having attended to the best of my ability to the evidence, I cannot say that the defendants have convinced me that, if they had done their duty, any damage whatever would have accrued to the plaintiffs. The case, therefore, is one in which, in my opinion, negligence is brought home to the defendants, in which I cannot tell whether any portion of the damage did or did not result from the act of God, in which the defendants have prevented me from telling what the effect of the act of God would have been if they had done their duty, and in which I cannot distribute the total amount of damage between their negligence and the act of God further than by saying that they have not convinced me that any portion of the damage [520] age which has accrued would have accrued if *they had done what they ought to have done. I hold, therefore, that the plaintiffs are entitled to damages.

It is not disputed that the measure of damages will be such a sum as is requisite to restore the property of the plaintiffs to the condition in which it was immediately before the flood. Therefore the judgment which I propose to give is this—to declare that the defendants are liable to pay to the plaintiffs the damage which resulted from the inundation of the plaintiffs' works on the morning of the 15th of November, 1875, and that the amount necessary to restore the buildings and property of the plaintiffs to the condition in which they were immediately before the inundation is the true measure of damages. Then to refer it to

the Chief Clerk to ascertain the amount and to direct the defendants to pay the amount certified within a fixed time after the certificate. Then there will be an injunction to restrain the defendants from permitting the banks of their Victoria Dock, and the tidal basin and entrance channel connected therewith, to remain at a level lower than four feet above the Trinity high-water mark, so as thereby to cause any future overflow of water from their dock, basin, or channel, or any of them, into the lands and works of the plaintiffs. And of course the defendants must pay the costs of the action.

From this decision the defendants appealed. The appeal came on to be heard on the 16th of July, 1878.

Southgate, Q.C., *Benjamin*, Q.C., *Murphy*, Q.C., and *Crossley*, appeared for the appellants.

Sir Henry James, Q.C., *Meadows White*, Q.C., *North*, Q.C., and *Rigby*, for the plaintiffs.

Southgate, in reply.

The following cases were cited: *Rylands v. Fletcher* (1); *Nichols v. Marsland* (2); *Withers v. North Kent Railway Company* (3); *Paradine v. Jane* (4); *River Weir Commissioners v. Adamson* (5); **Workman v. Great Northern Railway Company* (6); *Smith v. Fletcher* (7); *Hudson v. Tabor* (8); *Attorney-General v. Tewkesbury and Great Malvern Railway Company* (9); *Reg. v. York and North Midland Railway Company* (10); *Davis v. Garrett* (11); *Biscoe v. Great Eastern Railway Company* (12); *Coe v. Wise* (13).

At the conclusion of the argument,

JAMES, L.J., said: We are all of opinion that Mr. Justice Fry's judgment must be affirmed, with a variation omitting the declaration that the whole of the damage was due to the wrongful act of the defendants, and that they were liable to make good the whole of it. But as some important questions are involved, on which we wish to give an opinion, we will take time before we state the grounds on which we proceed.

(1) Law Rep., 3 H. L., 830.

(2) 2 Ex. D., 1; 19 Eng. R., 335.

(3) 27 L. J. (Ex.), 417.

(4) Alleyne, 26.

(5) 1 Q. B. D., 546; 17 Eng. R., 190;
2 App. Cas., 743; 21 Eng. R., 1.

(6) 32 L. J. (Q.B.), 279.

(7) Law Rep., 9 Ex., 64; 8 Eng. R., 510.

(8) 2 Q. B. D., 290; 20 Eng. R., 360.

(9) 1 D. J. & S., 433.

(10) 1 E. & B., 178.

(11) 6 Bing., 716.

(12) Law Rep., 16 Eq., 636; 7 Eng. R.,
630.

(13) Ibid, 1 Q. B., 711.

1878. Aug. 7. JAMES, L.J., this day delivered the judgment of the Court (James, Brett, and Cotton, L.JJ.), as follows:

We intimated at the close of the arguments that the judgment of the learned judge from whom this appeal is brought would be affirmed with a variation not substantially affecting the merits of the appeal, and not, therefore, affecting the rights of the respondents to the costs of the appeal, which will be given to them.

The works of the plaintiffs were inundated by a high tide which came over a low part of the retaining banks of a channel leading to the docks of the defendants, and the learned judge arrived at the conclusion that the inundation of the plaintiffs' works was due to the neglect and default of the defendants in not having maintained a proper and sufficient barrier against the influx of the tidal flood.

A great deal of the argument before the court below and in this court turned upon the question whether there was 522] any statutory *obligation to make and maintain the banks at any prescribed height. The acts of Parliament under which the docks were constructed referred to certain deposited plans and sections showing the position and levels of the works authorized to be made. The first act referred to them as the plans according to which it was intended to construct the docks and other works, but did not contain any express enactment that they should be made accordingly; but the company having occasion to go again to Parliament, the omission (if it were practically an omission) was remedied by an express enactment in the second act (22d section), that it should be lawful for the company to continue, make, complete, and maintain the dock and works in the situation and upon the lands, &c., and according to the levels defined on the sections so deposited. The contention before us was that no such levels could be found so deposited, and two witnesses had in fact deposed that the plans were so inaccurate or defective that they could not find any such levels. The learned judge, however, found no difficulty in discovering such levels, and upon a careful examination of the plans we agree with him that such levels are described sufficiently and clearly for any person really desirous to find in the plans what the act of Parliament said was to be found there. That is to say, there is on the plan a section running through the centre of the proposed works, which shows a line said to be a line corresponding with the upper surface of the banks, and which shows that this line was to be four feet above Trinity high-water mark, and the cross sections

show the banks of the dock at a level really corresponding with this line. There was, therefore, a statutory direction that the banks were to be four feet above the Trinity high-water mark. It was not contended by the counsel for the appellants that if that was so there was not a statutory obligation to make and maintain retaining banks or walls of that height. The words of the act are that it should be lawful for the company to make their works according to those levels, and of course it was optional with them to make or not to make their works at all. But if they made them, and not to those levels, they would be in this dilemma—either from the neglect of that provision or condition the whole works were illegal, or the provision as to levels ought to be construed as imposing a distinct and *separate [523 obligation to that effect, the breach of which would not invalidate all their acts and proceedings, but would have to be remedied or punished like any other breach of statutory obligation.

Of course the company would prefer their liability under the latter construction to their liability to capital punishment, which would be the consequence of the former; and we prefer that construction. It was, however, with great energy and confidence, insisted before us that the liability was destroyed by the repeal of the act which contained that section. That act was repealed under the following circumstances: There were three dock companies, the Victoria, the London, and the St. Katharine, who applied to Parliament to authorize the two latter to be amalgamated and to absorb the first, and, to give effect to that arrangement, a new act was passed repealing the existing acts of the three companies, and providing for the creation of the powers and liabilities of the new company, the present defendants. There was this peculiarity in the composition of the new act, that although it repealed all the old acts, it purported to continue in a schedule certain clauses, and among those clauses was not the 22d section of the act of 1853; and it was very strongly urged upon us that this very peculiar style of legislation operated as a very special and peculiar repeal of everything in the 22d section so as to preclude the effect of the 92d section of the amalgamating act, which provides that the new company shall maintain, work, and use the three docks respectively subject to all statutory duties, obligations, and liabilities to which the three companies respectively immediately before the commencement of the amalgamating act were, or, but for it, would become subject in respect of the three docks respectively. That contention

is wholly inadmissible. When companies come to Parliament for an amalgamation for their own convenience, it would require very clear words indeed to induce the court to conclude that they had contrived to slip in anything to destroy any existing liability in themselves or any existing right in any one else. And the 92d section is, in fact, what one always expects to find and does find in all these acts sanctioning private arrangements between existing companies; and there is really no doubt whatever as to the construction of the provision repealing the 22d section of the 524] old act, and the 92d section, taken *together. The 22d section is repealed as to powers, because the company itself is to go, and the powers of the amalgamated or new company are otherwise defined; but it is continued as to liability, except that such liability is transferred to such new company. We agree with the court below, therefore, that the company was clearly under a statutory liability to maintain their banks up to the four feet level.

But, although we have thought it right to go fully into the whole of this case as to statutory liability, having regard to the fact that it was made the foundation of the judgment appealed from, and that it constituted by far the greater part of the case argued before us, yet, in the view we take of the case, it is really immaterial, for, if there were no such statutory liability, there is another and more extensive liability on the defendants. There is nothing in the act, either expressly or by implication, to affect the ordinary liability of the company as riverain proprietors who intermeddle with an existing river wall. They were authorized to take land and make works on the banks of the river, and what they did was to excavate a great bell-mouthed bay in the channel of the river, and to make a channel or cut from that bay into their dock, which is some distance back from the river, and in the execution of those works to destroy the existing river wall. They became landowners frontagers on the river, interfering with the wall rightfully insisted on by the Commissioners of Sewers, and as such they were as much liable to have and maintain a proper river wall as any other of the landowners frontagers there. If they had merely made the bell-mouthed bay, no one could have doubted that it was their duty to have and maintain a river wall around the curve, just as if it was to have and maintain one across the chord of that curve. But they do not maintain such a wall around the curve if there is any opening in it. An inclosure or defence not continuous is no inclosure or defence at all. They were bound to have a river wall,

and that wall a continuous one; and, therefore, the whole wall or bank, from the extreme point at one end of the bay, along one side of the defendants' works round the docks, and back to the extreme point at the other end of the bay, was and is the river wall which it is their duty to have and maintain. If the gates which are across what is called the lock *had been closed to the inflowing tide, that [525 would have completed the wall at that place; but they were constructed so as to open to such tide. In fact, the defendants' works, being all open to the tide, and the water in them at high tide being part of the same sheet or body of water as that of the mid-channel, the bell-mouthed bay, the lock, the cut, the docks constitute, in fact, a bay and creek of the river as much as any natural bay, creek, or other widening or opening to be found along the course of it. The whole of this wall or bank was, therefore, a river wall or bank subject to the like liabilities and jurisdiction as any other part of the river wall. The defendants themselves called the officer of the proper commissioners to prove that the standard appointed for the river wall had been, in November, 1875, and for thirty years previously, to his certain knowledge, 4 ft. 2 in. above Trinity high-water mark. And it was the plain duty of the defendants, as riverain proprietors, to have and maintain a wall that height.

But even if the defendants had succeeded in establishing that they were not under any statutory or special liability, but only under the common law liability, to take proper and sufficient precautions, it would not, in our opinion, make any substantial distinction in their favor. In judging the question of fact whether they had taken proper and sufficient precautions, all the surrounding circumstances must be taken into consideration, and, in our judgment, it would be far from sufficient for them to show that they had taken the precautions sufficient according to a table of tides for forty years. If there had been nothing else, that possibly might have excused them; but they ought to have set against that the judgment of the commissioners, based on the experience and tradition of centuries, which had fixed 4 ft. 2 in. as the height. And we now know that, although up to 1874, for forty-one years, there had been no tide higher than 3 ft. 9 in. at the Shadwell Dock (which is said to be 3 inches higher than the Victoria), there were in 1874, 1875, and 1877 tides of 4 ft. 3 in., 4 ft. 6½ in. (the one in question), and 4 feet. The great probability is that the commissioners had previously experienced similar tides, and had fixed 4 ft. 2 in. accordingly; and if in a matter connected with

the inundation of a whole district a landowner prefers his own deduction from the experience of a few years (not even 526] exhausting living *memory) to the deliberate judgment of the constituted authorities, whose official experience and traditions must, as I have said, date from centuries back, he does it at his peril, and he cannot, in my judgment, be said to have taken and used every precaution and care reasonably to be expected from him under the circumstances. To what I have said is to be added that the company's own engineer, before they began their works, had fixed 4 feet as the limit. And, if there had been any shadow of excuse for them before, it was, in my judgment, wholly and most culpably inexcusable in the defendants not to have accepted the warning of the tide of 1874, as to which it is not suggested that it was due to any earthquake or other convulsion of nature, or to anything else than a peculiar combination of those causes which make some tides higher than others, and which might, therefore, be expected again to occur. It would be difficult, therefore, to fix even the common law liability at less than 4 feet.

The learned judge was, therefore, clearly right in holding that the defendants had been guilty of neglect and breach of duty, and making the consequential decree against them. But there was one matter which may possibly, and very probably, turn out to be a mere matter of form, on which we intimated that we did not agree with him. He made a declaration that the whole damages sustained by the plaintiffs was due to the defendants' wrong. And that arises in this way: Assuming the liability to be to maintain the wall at 4 feet, as the judge thought, or at 4 ft. 2 in., as we think, the tide is said to have been 4 ft. 5 in., although it is not very easy to reconcile that with the height of 4 ft. 6½ in. at the Shadwell Dock. But it must, for the present purpose and on the present occasion, be assumed to have been 4 ft. 5 in., and, therefore, there was a tide considerably higher than that which would have been kept out by the walls of the defendants if they had strictly and fully done all that was incumbent on them to do. Upon this, it was contended by the defendants that, as they were not bound to keep out a 4 ft. 5 in. tide, the plaintiffs would have been equally flooded by that abnormal tide; and therefore no damage really arose from the defendants' neglect. But this argument does not seem to us to be correct. Suppose that the same damage would have been done by the excess of height 527] of *tide if the wall had been of due height, as has been done; yet, if the damage has been done by reason of

the wall not being of due height, the defendants are liable for that damage arising from that cause, and are not excused because they would not have been liable for similar damage if it had been the result solely of some other cause. And, moreover, long before the tide rose even to 4 feet, it began to flow over towards and into the plaintiffs' works; and, of course, the defendants cannot escape their liability for the damage so occasioned because the tide afterwards went on swelling and swelling, even if it could be shown that the same damage would have been occasioned by that additional height of water if the banks of the defendants had been in proper condition. They had been guilty of neglect, and had done damage before that extra height had been reached, and their liability to the plaintiffs was complete when the damage was done.

But, however, it was further suggested that the whole damage was not due to the defendants' neglect, and that, as there was a tide supposed to be 4 ft. 5 in., that tide might have occasioned, and it is contended by the defendants that it did occasion, a substantial and ascertainable portion of the plaintiffs' damage. No doubt, if the court can see on the whole evidence that there was a substantial and ascertainable portion of the damage fairly to be attributed solely to the excess of the tide above the proper height which it was the duty of the defendants to maintain, occurring after the excess had occurred, and which would have happened if the defendants had done their duty, then there ought to be a proper deduction in that respect. If I were to judge upon the evidence as it stands, supposing nothing to be shaken and nothing to be altered or controverted by new evidence, I should have no hesitation in agreeing with Mr. Justice Fry as to this. Having regard to the time at which it is alleged that the water burst over in a cataract and overcame the efforts of the plaintiffs to barricade the openings into their works, and to what they did in 1874, and what they might have done in 1875 if they had had more time to prepare only and a few inches' height of water to deal with, and the immense difference there is between the tide rising equally over the whole length of the river wall and distributing itself impartially over the whole district, and the tide finding a *very weak part, a great depression and opening, [528 immediately over the plaintiffs' property,—I say, having regard to all those things, the defendants have a very difficult task to show that any portion of the damage was not due to their neglect. But the difficulty in the way of sustaining the declaration on that subject is this—that that

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question does not appear to have been sufficiently in issue or tried at the hearing of the cause. It was very early assumed that the amount of damage would be a matter of reference, and it does not appear that the question whether, on any ground or any principle, some deduction ought or ought not to be made from the damage, was really gone into. Indeed, until the question of liability was ascertained, and the extent of that liability—whether the limit was 3 ft. 8 in., as the defendants have contended, and whether they had failed even to satisfy that limit, as the plaintiffs contended, or 4 feet or more than 4 feet—it was practically impossible for the defendants to direct their cross-examination or examination in chief to the question whether any, and, if any, what damage was due to the excess of the tide above that limit. The judgment and decree of the judge will, therefore, be affirmed, with a variation—omitting the declaration to which I have referred. The appellants must pay the costs of the appeal.

Solicitors for plaintiffs: *Kingsford, Dorman & Kingsford.*

Solicitor for defendants: *W. M. Hacon.*

See 10 Eng. Rep., 118 note; 17 Eng. Rep., 200 note; 21 Eng. Rep., 35 note.

As to liability for injury resulting from an accident, see 26 Am. Rep., 83 note.

As to when the act of God excuses, see 18 Am. Dec., 452 note; 19 Am. Law Reg. (N.S.), 550 note.

In a civil action for assault and battery alleged to have been made by defendant by the discharge of a loaded pistol at plaintiff, the court charged that if defendant did not assault the plaintiff, but the pistol, being in his hand for a lawful purpose, was discharged by careless handling or by accident, there should be no recovery in the action; and again, that if plaintiff assaulted defendant, the latter having the pistol in his hand, and its discharge was caused by plaintiff's act, without design on defendant's part, defendant was not liable; held, that there was then no error in refusing a further instruction, asked by defendant, that there could be no recovery "unless the shooting was wilful and intentional." *Krall v. Lull*, 5 N. W. Reporter, 592, bottom p., Wisconsin.

An exception to a charge as being incorrect as to statement of testimony,

and facts admitted should point out the particular matters complained of, contract provided for the running of certain logs at a certain sum per thousand, and also for furnishing water for certain other purposes; held, that the contract was indivisible, and an instruction based upon a contrary theory was erroneous.

Accident will not relieve a party from an obligation to perform the contract, though it is caused by no want of care on his part: *Keystone L. and S. Manuf'g Co. v. Dole*, 5 N. W. Reporter, bottom p., 316.

Where the condition either of a bond or recognizance becomes impossible of performance by the act of God, or of the law, or the obligee or conusee, performance is excused. E.g., a sheriff's recognizance to appear on an attachment, where he is sick at the day, and afterwards dies: *People v. Manning*, 8 Cow., 297.

Sickness excuses delay, or even non-performance, of contracts for personal services. In case of a partial non-performance of such contract, by reason of sickness, where payment was to be made, on its completion at a certain rate per day, a recovery for the work

done can be had only on a *quantum meruit*, and not on the contract: *Green v. Gilbert*, 21 Wisc., 401.

The act of God that will excuse the performance of a contract must be one rendering performance impossible. If it merely makes it difficult or undesirable, it is not sufficient. Thus, where schools were suspended on account of the prevalence of small-pox, the teacher remaining ready to perform his contract, he was not, by reason of such suspension, precluded from his right to compensation during such period: *Dewey v. School District*, 19 Am. Law Reg. (N.S.), 548, 550 note; 5 N. W. Reporter, 646, bottom pp., Supreme Court, Mich.

K. & N. made a contract in writing, with a clause of forfeiture of \$100 for non-performance; N. agreeing to erect and finish a house for K. before April 1st, 1867, and K. to make certain payments to N. at various stages of the work. On March 29th, 1867, when the work was completed, "with the exception of plastering, painting, and one-third of the foundation wall," the house was blown down. K. promised to pay N. a certain additional sum for rebuilding, and after the completion of the house, in June, 1867, a lien was filed for that amount.

Held, K.'s promise of an additional sum was without consideration. N. must bear the loss, whether occasioned by the act of God or his own carelessness. To make the act of God a defence to performance, it must amount to an impossibility.

The act of God might excuse performance within the *time* specified, as this is not of the essence of the contract, yet it should be performed *cy pres*—as soon after the time as practicable: *Moyer v. Kirby*, 2 Pearson (Pa.), 64.

Inability to perform a contract does not release a party to it from his obligation, if he was disabled by his own default.

Where one contracts to advance capital, his default in doing so is not excused by the occurrence of a financial panic: *McCreery v. Green*, 38 Mich., 172.

In replevin, when the defendant has given a delivery bond for property which perishes in his hands, plaintiff's measure of damages for unlawful de-

tention is the same as if the property had been preserved to abide the result of the action: *Hinkson v. Morrison*, 47 Iowa, 167.

Where a person absolutely undertakes to do something which turns out to be impossible, he is guilty of a breach, and liable in damages if he do not perform it, and the other party may sue, though he have not performed all his portion of the contract: *Rosel v. Adam*, 2 Victorian Law Rep. (Law), 170.

Where a sub-contractor has performed substantially all the work his contract calls for, and, before the entire work to be performed by the original contractor is done, the building is destroyed by fire, and the owner of the building and the original contractor make a settlement, in which deductions are made of the value of whatever remained unperformed under the sub-contract, the sub-contractor will be entitled to recover from the original contractor for the work actually done by him, notwithstanding some things of minor importance may not have been performed in accordance with the sub-contract.

The rule, that unless a contract for the erection of a building provides against contingencies that may happen during the progress of the work, the loss, if any occurs, will fall upon him who has agreed to do any given work that is possible to be done, because his agreement is to that effect, and he is not excused from performance by reason of its sudden destruction, can have no just application to a sub-contractor who has simply undertaken to do a distinct portion of the work: *Clark v. Pusse*, 82 Ills., 515.

Plaintiffs contracted to build certain buildings for defendant. The contract price was, by the terms of the contract, to be paid in instalments as the work progressed, "provided that, in each of said cases, a certificate shall be obtained and signed by an architect named." In an action to recover a balance of the last instalment, plaintiffs' evidence showed that all the instalments, except the last, and the greater portion of that, was paid without requiring the certificate, and without objection or reservation; that the architect had not in fact superintended the work, and that several changes had been made in the specifications.

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Defendant, after the work was finished, expressed himself satisfied and pleased. When the claim for the balance was presented, defendant made no objection that the contract was not performed, but threatened that, unless plaintiffs would give up a claim they had against him, independent of the contract, he would throw the whole matter into the architect's hands. The court dismissed the complaint. Held, error; that the evidence was sufficient to justify a finding of a waiver of the condition as to a certificate, and required a submission of that question to the jury; that if the certificate had been previously waived, it was too late to insist upon it when the balance was demanded, especially for a purpose entirely disconnected with the contract: *Haden v. Coleman*, 73 N. Y., 567, reversing same case, 42 N. Y. Superior Ct., 256.

In an action for flowage of land by a dam, the fact that another dam contributes to some extent to produce the flowage complained of is no defence: *Jones v. U. S.*, 48 Wisc., 885, citing *Arimond v. The G. B. & M. Canal Co.*, 35 Wisc., 41, and *Pumpelly v. The G. B. Co.*, 13 Wallace, 166.

One wrongdoer, by whose fault damage is caused to a party free from fault, cannot relieve himself from liability therefor by showing that some other wrongdoer contributed to produce the injury: *Folsom v. Apple, etc.*, 41 Wisc., 602.

There being a bridge below plaintiff's land over the stream in which defendant's dam is maintained, which bridge did not obstruct the water *at its natural flow*, there was no error, as against defendant, in charging the jury that, "if the defendant, in using the water *beyond its natural flow*, would not have overflowed plaintiff's land, *had there been no obstruction at the bridge*, that would not excuse defendant from liability to the plaintiff, provided defendant had notice of such obstruction and of the fact that its effect, together with defendant's use of the water beyond the natural flow, would be to flow plaintiff's land;" and that if such obstruction and such effect thereof were known to defendant's agent employed to manage its dams, it must be regarded as known to defendant: *Folsom v. Apple, etc.*, 41 Wisc., 602.

Where separate and independent acts of negligence—i.e., two parties negligently allowing water gathered by them in pipes to flow into a cellar—are the direct causes of a single injury to a third person, and it is impossible to determine in what proportion each contributed to the injury, either is responsible for the whole injury; and this although his act alone might not have caused the entire injury, and although, without fault on his part, the same damage would have resulted from the act of the other: *Slater v. Mersereau*, 64 N. Y., 138.

To constitute a liability under the provisions of the seventh section of the law "To provide against the evils resulting from the sale of intoxicating liquors" (2 S. & C., 1432), before the same was amended; where the action is to recover for injuries resulting from habitual intoxication during a period of years, it is not essential to a recovery that the defendant shall have been the sole cause of such habitual intoxication.

In such case, where the right of action is for the damages to person, property, or means of support, resulting from such habitual intoxication, one who contributes to cause that condition by his illegal sales, which of themselves tend to, and are calculated to produce that result, is presumed to have intended it, and is liable for the damages resulting, though others may, by their illegal sales, have contributed thereto, without his knowledge, or without preconcert with him: *Boyd v. Watt*, 27 Ohio St. R., 259.

Where different parties pollute a stream by the discharge, separately and independently of the others, one of the number is not liable for all the injury suffered by another, because of the nuisance thus created; each is liable only to the extent of the wrong committed by him.

The authorities holding that where a direct personal injury is occasioned by the separate and concurring negligence of two or more parties, an action against one or all will lie, and those holding that an equitable action will lie to restrain parties who are severally contributing to a nuisance, distinguished: *Chipman v. Palmer*, 77 N. Y., 51, affirming 9 Hun, 517.

Where a city is sued for negligence

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in constructing a sewer of insufficient capacity to carry off all the water during heavy rains, whereby the plaintiff's lot is flooded, if it appears that the injury was caused in part by the owner of an adjacent lot filling up the same, and stopping a natural drain, the city will not be liable for the entire damages sustained: *Paris v. Crackraft*, 85 Ill., 294.

Where a party's sewer and catch-basin have been properly constructed, so as to carry off the water, and have been kept in repair, he cannot be held liable for the damages an adjacent owner of premises may sustain by water overflowing the basement of his building, and a judgment holding such party liable will be reversed: *Kohlhammer v. Weisbach*, 90 Ill., 311.

Where two or more parties act, each for himself, in producing a result injurious to plaintiff, they cannot be held jointly liable for the acts of each other: *Blaisdell v. Stephens*, 14 Nevada, 17.

A joint action does not lie against separate owners of dogs by whom the sheep of a third person have been worried and killed: *Van Steenburgh v. Tobias*, 17 Wend., 562; *Russell v. Hawkins*, 2 Conn., 206; *Adams v. Hall*, 2 Verm., 9.

If dogs, owned by different persons, jointly injure sheep, trespass on § 9, c. 104, of the Gen. Sts. may be maintained against one only of such owners, although the other be known to the plaintiff: *Rowe v. Bird*, 48 Verm., 578.

Where dogs belonging to several owners are found in company, engaged in

killing sheep, each owner is responsible for the injury done by his own dog, and for no more: *Auchmuty v. Ham*, 1 Den., 495.

Where cows, belonging to several owners, are found in the garden of an individual, committing a trespass, each owner is liable for the damage done by his own cow, and for no more.

And in the absence of all proof as to the amount of damage done by each cow, the law will infer that the cattle did equal damage: *Partenheimer v. Van Order*, 20 Barb., 479.

Two dogs, of unequal size, owned by different persons, in company, killed sheep of the value of \$19, and the jury, in an action against the owner of the larger dog, found a verdict against him for \$12 damages. Held, that the jury had the right to say the larger dog did more damage than the smaller one, and that their apportionment of the damages could not be shown to be incorrect, and was therefore conclusive: *Wilbur v. Hubbard*, 35 Barb., 303.

In Ohio, by statute, if any dog or dogs shall kill or injure any sheep, the owner or harbinger of such dog or dogs, or any of them, shall be liable for all damages that may be sustained thereby. In that state it was held, under this statute, by the Washington county common pleas, that where the dogs of two or more persons, together, kill or injure the sheep of another, the owners of the dogs, jointly, or each owner, severally, is liable for the entire damage: *Baldwin v. Skillington*, 1 Western Law Monthly, 389.

[9 Chancery Division, 529.]

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[1872 W. 185.]

Agency—Commission—Overcharges—Knowledge of Principal—Opening settled Accounts.

Where accounts are impeached and it is shown that they contain errors of considerable extent both in number and amount, whether caused by mistake or fraud, the court will order such accounts, though extending over a long period of years, to be opened, and will not merely give liberty to surcharge and falsify; and supposing a fiduciary relation to exist between the parties, the court will make a similar order

if such accounts are shown to contain a less number of errors, or if they contain any fraudulent entries.

Seemle, in an action between principals and agents impeaching the agents' accounts, actual knowledge of antecedent fraud in the agents by one who subsequently became a member of the firm of the principals would not, if proved, be any bar to their claim.

THE plaintiffs in this suit had for many years carried on business as merchants and agents at Calcutta, under the firm of "Williamson Brothers & Co."

The defendants had for many years carried on business at Manchester as merchants and commission agents.

In 1850 an arrangement was entered into between Williamson, Herriot & Co., of Calcutta, in whose names the business of the Calcutta house was at that time carried on, that the defendants' firm at Manchester should act as agents for them for the purchase and shipment of Manchester goods upon the terms then agreed upon. These terms, as subsequently modified, were agreed upon between the firms of Williamson Brothers & Co. and the defendants, and were embodied in letters between the parties, and were the terms on which the agency was continued for many years; and the commission allowed by the terms so agreed upon was, as the plaintiffs alleged, to have covered all the defendants' profit in respect of the agency.

The object of the present suit was to open, as against the defendants, the accounts in respect of their said agency from the year 1853 until shortly before the commencement 530] of the suit in 1872, *but as the defendants' books could not be produced previous to the year 1860, the evidence in the case was limited to the period from 1860 to 1872.

The grounds on which the plaintiffs impeached the defendants' account were, in substance, as follows: The plaintiffs alleged that the defendants had, during the whole period of their agency, made false charges in their invoices, debiting the plaintiffs with large sums which the defendants had never paid, or which they had received back from other persons to whom they purported to have paid them under the name of discounts, and that they had also made other charges which in their position as agents for the plaintiffs upon the terms agreed upon they were not entitled to make, particularly for profits which they were alleged to have made in the purchase on behalf of the plaintiffs of gray and white shirtings, on bleaching the white goods and in packing the goods which they shipped for the plaintiffs; that, although the plaintiffs generally sent their bills to the defendants to be discounted, the defendants often discounted such bills for themselves and used the money; and that,

when bills were entered by the defendants in the accounts as having been discounted on a certain day, they were often discounted on a later day and at a lower rate.

The plaintiffs further alleged that, whereas they had instructed the defendants to insure the goods in the best offices, they had often not done so, but had sent the goods at their own risk, at the same time charging the plaintiffs with insurance premiums higher than would have been charged in the best offices.

The plaintiffs prayed that the defendants might be declared liable to pay the amount of the alleged overcharges and the profits alleged to have been improperly made in connection with their agency, and that for this purpose proper accounts might be taken, and inquiries made, and directions given. The defendants denied that they were agents except for the purpose of purchasing goods for the plaintiffs: they alleged that they acted in part as principals and in part as agents; that, as regards many of the charges complained of, they were entitled to a fair profit on the goods, and were justified by the course of dealing between the parties, by the custom of the trade in Manchester, and by the knowledge of the *plaintiffs in respect of the [531] charges complained of. The defendants also alleged that they were themselves the insurers of the goods, and justified the charges made in respect of such insurance.

The evidence was very voluminous, and it is unnecessary to refer to it for the purpose of the present report.

When the suit came on for hearing the counsel for the plaintiffs were requested to select two cases of overcharge under each head of complaint.

Witnesses were examined especially with the view of establishing on behalf of the defendants that the plaintiffs had actual or constructive knowledge of the course of business pursued in the defendants' house, and of the mode in which their charges were made, and also of the custom of the trade in Manchester. The defendants endeavored to establish that the plaintiff, W. C. Williamson, had had conversations many years ago with gentlemen connected with the defendants' business, especially with Mr. Herriot, who was for many years one of the defendants' clerks, and had thus become acquainted with the course of business pursued by the defendants and the nature of their charges. They also adduced evidence to show that one of the plaintiffs, William Craik, had been in the house of Mr. William Graham, a Manchester and Indian merchant, and had the chief management of the department for buying, preparing, and packing goods

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in Manchester for export to India, and was therefore conversant with the manner in which the charges in respect of such goods were made out, and with the custom of the Manchester trade.

Sir Henry James, Q.C., Chitty, Q.C., Robinson, Q.C., and Bryce, for the plaintiffs.

Sir John Holker, A.G., Benjamin, Q.C., Marten, Q.C., and Romer, for the surviving partner of the defendants' firm, and for the representative of a deceased partner.

Southgate, Q.C., Edwards, Q.C., and K. M. Mackenzie, for one of the defendants who had retired from the firm.

Davey, Q.C., and Levett, for one of the defendants who was dismissed from the suit.

532] *JESSEL, M.R.: I do not desire to hear a reply in this case, upon which I have for some considerable time made up my mind. A very large portion of the evidence has been given in writing; I have therefore had full opportunity of considering it during the long period which the case has taken in discussion, and during the interval which elapsed between the opening of the case and its further prosecution. I have also received, as I generally receive, a great deal of assistance from counsel.

This is a bill by principals against their agents to take accounts or rectify accounts which have been settled. The period over which they extend is nearly twenty years, and the substance of the allegations is that the accounts contain numerous and serious errors. The form of pleading, no doubt, is not quite in accordance with what the judgment will be, because by the form of pleading the court is asked to do that which no court can do, namely, to go through the accounts and to disallow a large number of items in taking those accounts, and make declarations accordingly. That is a thing which the court, so far as I know, never did. The practice of the Court of Chancery, which of course is the practice of the High Court of Justice, is to consider whether the accounts shall be opened, or whether there shall be liberty to surcharge and falsify; that is, if the court is of opinion that errors of sufficient number and sufficient magnitude are shown, it is not, as I understand it, necessary that the errors shown should amount to fraud. If they are sufficient in number and importance, whether they are errors caused by mistake or errors caused by fraud, the court has a right to open the accounts. I have known cases—for instance, *Clarke v. Tipping* (¹), which we are familiar with—in which the court abstained purposely from using the term “fraud,”

(¹) 9 Beav., 284.

although I am afraid no other term could be properly applied. That is not necessary. But there is this to be considered, that when the account is between persons in a fiduciary relation and the person who occupies the position of accounting party—that is, the trustee or agent—is the defendant, it is easier to open the account than it is in cases where persons do not occupy that position—that is to say, that a less amount of error will justify the court in opening the account.

*Then I have one other observation to make, which [533 is that, where you show a single fraudulent entry in the case of persons occupying the position of principal and agent, or trustee and *cestui que trust*, the court has actually opened an account extending over a greater number of years and closed for a much longer period than the account I have before me; I mean in the case of *Alfrey v. Alfrey*, before Lord Cottenham⁽¹⁾. We therefore have this as a sort of guide without laying down any general rule, because every case must depend on its own circumstances, that where the accounts have been shown to be erroneous to a considerable extent both in amount and in the number of items, or where fiduciary relations exist and a less considerable number of errors are shown, or where the fiduciary relation exists and one or more fraudulent omissions or insertions in the account are shown, there the court opens the account and does not merely surcharge and falsify.

The effect of course is very different. Where you open the account, the account is taken from the beginning, and in those cases where, as in this case, the books are lost for a certain period, the court does not now do what it formerly did, namely, insert special directions in the judgment which were necessary to protect the person accounting who, in the ordinary course of business, as has happened in this case, destroyed his books. Up to 1860 some of the books seem to have been destroyed—not improperly, because of course merchants do not keep their books forever, and the loss of those books might put the defendants into a difficulty. Formerly, when the accounts were sent to the master, it was the custom of the court to insert special directions in the decree in order to avoid the hardship which the innocent loss of the books or the innocent destruction of the books might subject defendants to. That is not necessary now, because the same judge who orders the accounts to be opened presides over the taking of the accounts in chambers.

The substance of the case is really very simple indeed,

⁽¹⁾ 1 Mac. & G., 87.

although the details are enormous. The plaintiffs say that they employed the defendants as agents to buy and ship goods for them. When I speak of the plaintiffs I mean the firm for the time being, and in the same way when I speak 534] of the defendants I mean the *defendants' firm for the time being. They were not the same people throughout, but for all substantial purposes I treat them as one, though in drawing up the judgment care will be taken only to make the separate defendants responsible for what occurred in their own time.

The plaintiffs say that from the very beginning of their connection they had two sorts of engagements or arrangements with the defendants' firm. As to one class of business they make no complaint, and therefore the judgment will not relate to that in any way. But, as to what I may call the commission business, they say that they employed the defendants as their commission agents in Manchester, they being a firm in Calcutta. The plaintiffs employed the defendants as agents to buy and forward goods to them at Calcutta, and they allege that, being such agents and being paid on commission, the defendants throughout the period of the connection made gross and fraudulent overcharges in their accounts. That is the charge. It is necessary of course to prove the whole of that charge, as I have already explained.

Some of the charges may not be fraudulent ; some of them may not be such as would justify me in opening the accounts. But if I once come to the conclusion that there are a sufficient number of errors proved, and of sufficient amount to entitle me to open the accounts, it will then be of course necessary to consider the other charges when we come to take accounts in chambers. If I arrive at the conclusion that one or more overcharges are proved, it may not be perhaps strictly necessary to consider so very nicely the number or the amount of the other overcharges, but I am bound before opening the account to show that there are sufficient grounds for opening that account and nothing more. I am not bound to decide upon the propriety of every item which is challenged by the plaintiffs in the defendants' account. Were I to do so, I do not know when my judgment would end.

That being so, the first question to be decided between the parties is a question of fact. Were the charges made against the plaintiffs merely the prices paid by the defendants? As to that there is no contest. For all material purposes that is made out by the defendants' books, or is admitted by the answers. The defendants justify the mak-

ing of the charges on various grounds, *but there is [535 no dispute between the parties that on the items of invoice very frequently sums were charged which were not paid.

[His Lordship then went through in detail the various allegations of overcharge as regarded the various classes of goods, and the charges for packing, the allegations in respect to discounts and insurance, and the various grounds of defence set up by the defendants, and considered that the defendants had failed to rebut the plaintiffs' charges. He then considered the defence raised with respect to the additions made by the defendants to the costs of bleaching the white goods, as to which the defendants said that such charges were fair charges according to the custom of the Manchester trade, and that the plaintiffs must have known of it and be bound by it. With reference to the effect of the alleged knowledge of Mr. Craik and Mr. Herriot, his Lordship observed :]

I should like to say a word or two as to the principle which I think ought to guide the court in deciding these questions. The case set up by the defence appears to me to savor somewhat of novelty. As I understand the doctrine of partnership, which for this purpose is a branch of the law of agency, notice to a partner in a partnership matter during the continuance of the partnership is as a general rule notice to the firm. It has not, so far as I know, been held that notice to a man who afterwards becomes a partner is notice to the firm. It might be so held. We have the analogous case of notice to a solicitor who is also for this purpose an agent. Notice to a solicitor in the same transaction, or in any connected transaction, while he is acting for the same client, is notice to the client, but notice to him even prior to his acting for the client may be constructive notice to the client where it is clear he must have had it present to his mind, that is, he could not be supposed to have forgotten it when he was transacting the business of the client. It might well be that such an extension of the doctrine might apply in some cases to the case of partnership, but I am not aware that it has ever been so applied.

When we come to a question of fraud different considerations arise. It is not true that the knowledge of a fraud by a partner is necessarily the knowledge of the firm. A very obvious instance of the absurd result that would follow from such a doctrine may be shown, and is best shown, by an example. Suppose there is a firm *with half-a- [536

dozen partners who have a clerk, and the clerk has been in the habit of receiving presents from one of the sellers to the firm in order to pass goods of short weight, and further suppose that the clerk, not having been found out, is taken into partnership as a junior partner and continues the practice. Is it to be imagined, under these circumstances, that in a court of equity the other partners could not sue the vendor of the goods for the fraud, and not only sue him but their partner also? Could it be said that the knowledge of the partner was the knowledge of the firm for this purpose? I emphatically deny that any such doctrine could by any possibility be laid down by any judge, and I need not say it never has been laid down.

Of course fraud must be an exception. I put the case of a clerk knowing it before he became a partner, and not interfering with it afterwards. But it is immaterial that the knowledge was acquired during the partnership. Suppose, either from corruption, that is, from receiving presents or otherwise, or affection, the goods being supplied by a relative, one of the partners knows that the vendor is defrauding the firm. I am satisfied that, according to sound doctrine, that knowledge would not prevent the remaining partners from suing the parties to the fraud, and recovering in a court of equity. It appears to me that that kind of notice will not do when it is applied to cases of fraud.

But when you come to notice before the partnership, relating not to those transactions but to prior transactions, there are some other considerations. First of all, if the clerk has been employed, we will say, in the house of the persons committing the fraud, and then goes into the house which has been defrauded, it by no means follows that he knows that the former house will continue their course of fraudulent conduct. He may think, "They are aware that I know all about it, and they will not attempt to go on now that I have become a member of the firm," or if he has the opinion that they will go on, then you can only look upon him as an accomplice. He may be influenced by gratitude in the case of the former masters having recommended him to the firm in which he has become a partner, or he may be influenced by that curious feeling of honor which is said to extend to a very low class as regards morality, and think 537] that he ought not to betray the interests *of his former masters, but that he ought rather to suffer the small loss attributable to his small share as junior partner in the house than be guilty of that which he may think a breach

of duty. But in no way that I can see is actual knowledge of an antecedent fraud to be carried by the partner into the new firm of which he becomes a partner and thereby notice to be imputed to them.

But I am bound to say on looking to the evidence, that I do not think it comes up to anything of the sort.

[His Lordship reviewed the evidence respecting Mr. Herriot's knowledge when a clerk in the defendants' firm many years before he became a partner with Williamson, and considered that the plaintiffs could not through him have knowledge imputed to them. His Lordship further reviewed the evidence of the question whether, as the defendants alleged, the plaintiff Craik was fully conversant with the custom of the Manchester trade as to these charges, which custom, his Lordship considered, had not been proved to exist (the different houses in Manchester carrying on business in different ways), and therefore, in his Lordship's opinion, no knowledge of it could be imputed to Craik. His Lordship further considered that the allegation that Williamson himself knew of these charges was disproved. His Lordship added:]

It appears to me that it is impossible to acquit these defendants either of the knowledge of what was being done, or the knowledge that what was being done was wrongfully done.

[After a lengthened review of the various grounds of defence, his Lordship concluded thus:]

It seems to me on all these points the defendants fail. For the reasons I have given it is not necessary for me to go into the other cases of overcharge. When the accounts are taken in chambers I shall be able to do justice between the parties by allowing them remuneration where remuneration is due, though not charged in that character, and by disallowing other overcharges, if it turns out that they are in excess of fair charges. But I do not make those other charges the grounds of my present judgment. In my opinion the charges which I hold to be proved are fourfold more than enough to induce me to have the whole of the account opened from beginning to end, and therefore I refrain from going into the other *details. The judgment will be [538 to open the accounts in the usual way, with the limitation which I have before explained as regards each of the defendants, and that the defendants do pay the costs of the action up to and including the trial.

An appeal from his Lordship's decision was for a long

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time pending, but it was subsequently abandoned, and an arrangement was come to between the parties.

Solicitors for plaintiffs: *Phelps, Sidgwick & Biddle*, agents for Sale & Co., Manchester.

Solicitors for defendants: *Milne, Riddle & Mellor*, agents for Hinde, Milne & Sudlow, Manchester; *Bower & Cotton*.

See *Gething v. Keighley*, post p. 327.

[9 Chancery Division, 538.]

M.R., March 28, 1878.

In re HALL & BARKER.

[1878 H. 64.]

Solicitor and Client—Separate Bills of Costs in the same Bankruptcy—Taxation after Twelve Months—6 & 7 Vict. c. 73, s. 37.

The retainer and employment of a solicitor in such a matter as a bankruptcy, an administration, or a winding-up, does not constitute an entire contract so as to deprive the solicitor of his right to payment, except for costs out of pocket, till the whole matter is completed, and successive bills of costs in such a matter are not necessarily to be treated as one bill brought down to the date of the latest delivery.

Accordingly, where solicitors had been retained to act for a trustee in bankruptcy, and also to protect the interests of S., a creditor, who subsequently by arrangement with the other creditors took over the bankrupt's estate, and they delivered a bill of costs up to a certain date, with an intimation that there were then and would still be some further items, and delivered a second bill of costs incurred after the date to which the first bill came down,—on an application by S. to tax both bills, more than twelve months after the delivery of the first:

Held, that they must be treated as separate bills, and that the second bill only could be taxed.

In re Street (!) commented on.

THIS was a summons adjourned into court on the application of John Sands, that it might be referred to the Taxing 539] Master to *tax and settle the bill of costs of F. T. Hall and Theodore Barker, solicitors, in and relating to the matter of the bankruptcy of Augustus Ahlborn, which bill it was alleged by Sands had been delivered to him in part on the 8th of September, 1876, and completely on the 16th of February, 1877.

It appeared that Hall, one of the partners, was retained by Sands, who was a creditor of Ahlborn in February, 1875, to protect his interests in the bankruptcy, and that he acted for him in the matter till the 21st of December, 1875, when William Edwards was appointed trustee in bankruptcy, after which Hall continued to act as solicitor for Sands, and also for Edwards. Ultimately an arrangement was come

(!) Law Rep., 10 Eq., 165.

to in the bankruptcy under which the bankrupt's effects were to be handed over to Sands, and he undertook to pay the creditors a composition of 17s. in the pound, and also to pay the solicitors' costs, but it was arranged that the bankruptcy should still be kept alive.

On the 8th of September, 1876, the solicitors sent to Sands their bill of costs, amounting to £796 13s. 9d., down to the 17th of June, 1876, at which time the business was completed with the exception of the settlement of some small outstanding claims, and the sale of certain leasehold property. The following letter was at the same time sent to Sands by the solicitors:—

“Re Ahlborn.

“Herewith we beg to hand you an account of our charges in relation to this matter, a portion of which should be in the ordinary course chargeable against you personally, and the remainder against the trustee in bankruptcy. However, as arranged with you some time back, we send the whole to you, and trust you will find the amount satisfactory. You will observe that the charges are brought down to the 17th of June, 1876. There have been further items since then, and before the matter is finally closed there will be something more to do, but not, we hope or think, anything of much importance.”

Subsequently part of the bankrupt's leasehold estate was sold, and the solicitors deducted the amount of the bill of costs from the purchase-money. This was done, according to Hall's statement, with the sanction of Sands, but Sands denied that Hall ever *alluded to the bill of [540 costs having been paid out of the proceeds of the sale.

On the 16th of February, 1877, the solicitors sent to Sands a further bill of costs, incurred after the 17th of June, 1876, amounting to £164 18s. 4d., and wrote as follows:—

“Re Ahlborn.

“Inclosed we send you our further costs in relation to this matter, and also our cash account, showing a balance in your favor of £212 12s. 2d., for which we send you our check.”

On the 11th of February, 1878, Sands took out a summons for the taxation of the bills, which were, as the applicant alleged, so connected together as to be treated as one bill, though more than twelve months had elapsed since the delivery of the first bill.

Davey, Q.C., and *Macnaghten*, in support of the summons: The bills of costs in this case, delivered respectively

on the 8th of September, 1876, and the 16th of February, 1877, are to be treated as one bill, and are together liable to be taxed. It will not be contended that the second bill is not taxable, as it was delivered within twelve months, but the solicitors contend that the first bill is a distinct and separate bill.

Now, these bills both relate to the same matter, the bankruptcy of Ahlborn, and therefore come within the principle of the case of *In re Peach* (*), where an attorney had delivered his bill of costs in 1840, and continued to act for his client till 1843, when he delivered two other bills, extending over a portion of the time included in the first, and it was held that they must be treated as one bill, and be ordered to be taxed. So in *Stokes v. Trumper* (*), it was held that where a solicitor had been retained for and had undertaken a particular business, his bill of costs for carrying that business through to its termination was but one bill.

[JESSEL, M.R., referred to *Whitehead v. Lord* (*), where it was held, following *Harris v. Osbourn* (*), that as a general rule an attorney or solicitor retained to conduct a suit was under obligation to conduct it to its termination, and 541] that he could not sue for *his bill of costs until that period had arrived. That was the old principle at common law.]

The same principle was followed in the case of *In re Street* (*), where, on an application to tax three bills of costs of a solicitor in relation to the sale of three estates, one of which bills had been delivered more than twelve months, Lord Romilly considered that the clients were entitled to treat all the bills as referring to the same transaction, and to refuse to settle one without having the others.

The question was considered in the case of *In re Cartwright* (*), before Lord Selborne, sitting for the Master of the Rolls, where successive bills having been delivered relating to the same matter and on the same retainer, a letter written by the solicitor was treated, under the special circumstances of the case, as bringing them down to an entire bill, though most of them were delivered more than twelve months before the application for taxation. There his Lordship observed: "It is not, therefore, necessary for me to say anything about the rather important question, which was raised in a more general form by the arguments of Mr. Fry and Mr. Yate Lee, namely, that upon the principle of

(*) 2 Dowl. & L., 83.

(*) 2 K. & J., 232.

(*) 7 Ex., 691.

(*) 2 C. & M., 629.

(*) Law Rep., 10 Eq., 165.

(*) Law Rep., 16 Eq., 469, 474.

the cases of *Stokes v. Trumper* ⁽¹⁾ and *Whitehead v. Lord* ⁽²⁾, neither of which was a case of taxation, and of *In re Street*, which was a case of taxation, it is a correct view to hold, that, where the relation of solicitor and client has been continued, and the business of a particular retainer continues in a particular suit with reference to the same matter, if a client has a succession of signed bills sent in to him, each bill so sent in is to be regarded as an addition to the others, and as bringing the first bill down to the date of the latter, so that in the end the whole are to be treated as one single bill down to the date of the latest delivery. The argument was that these cases and their principle justify that general conclusion, which has not been disproved by any actual authority cited on the other side. That seems to me an important question, though not requiring decision in the present case. My own impression would be, that if all the cases could be looked at, which have been very numerous both before Lord Langdale and the present Master *of the Rolls, it [542] might be found difficult to reconcile that proposition with some of those cases. But those cases have not been cited to me, and I think that question should be reserved for future consideration if it should ever require to be determined."

In the present case, although the strictly regular course might have been for the bill to be made out against the trustee in bankruptcy, and for it to have been taxed in the bankruptcy, yet, as the solicitors were retained by Sands to protect his interest as well as to act for the trustee in bankruptcy, and as the costs related to the one matter, the client was entitled to treat the two bills as one, and not to settle until the whole business had been disposed of. According to the evidence of Sands, he was not aware at the time that the solicitors had deducted the amount of the first bill from the proceeds of the sale of the bankrupt's estate. The solicitors by their letter show that they consider the bills as relating to the one matter, and that being so, we submit that they should be treated as one bill, and taxed accordingly.

Roxburgh, Q.C., and *W. Bush Cooper*, for the solicitors.

JESSEL, M.R.: I shall not call upon you, Mr. Roxburgh.

This is an application to tax a bill which was delivered more than twelve months before the summons was taken out, and the question is raised whether or not the bill was actually delivered within the twelve months, not as a question of fact, but as a question of law, and that is raised in this way. It is said that the solicitors were engaged to pro-

⁽¹⁾ 2 K. & J., 282.

⁽²⁾ 7 Ex., 691.

fect the interest of Mr. Sands, in the matter of one Ahlborn, who had become a bankrupt, and who, at that time, was heavily indebted to Mr. Sands. It is said that the fact of his having employed them as his general solicitors was an employment in respect of one matter. It is said they were employed, at Mr. Sands' request, to protect his interests personally until Ahlborn became a bankrupt, to act for the trustee in bankruptcy, to protect his interests after the arrangement had been made by which the creditors accepted from Mr. Sands a composition of 17s. in the pound, and to protect his interest until every asset was got in. All that is 543] represented to me as protecting his interest in one *separate transaction, and as being a single retainer, and that the solicitors were not entitled to be paid anything until every individual matter relating in any way or in any form to the interest of Mr. Sands, in relation to the estate of Ahlborn, had been finally disposed of. Claims might have been made which would have occasioned a lapse of years to work out. Other questions of difficulty might have arisen when the bankruptcy had been practically completed, which might have taken half a century to work out.

Of course, if it is the law, I am bound by it, but I say most emphatically, unless it be the law, I will not endeavor to make it so, because I cannot imagine a state of law more injurious. The theory would be, that a solicitor, having undertaken to dispose of any matter of business, however complicated, for however many years it might possibly last, would not be entitled to get one single penny of profit from the client until that business was finally disposed of. It does not commend itself as a doctrine which would appear to me to be reasonable. It is not said to be founded on any statute. If the doctrine exists it is a doctrine of the common law, and, like all the doctrines of the common law, it is to be found set forth in some decided case or cases. I must accordingly look to the cases.

It has undoubtedly been decided that the retainer of a solicitor at common law to bring an action is a retainer to do one single thing, to bring the action to an end. Actions at common law did not, in former days, occupy a very long time, and were comparatively simple matters. Common law judges were perhaps not so familiar as they might have been with equitable proceedings, and there are instances where, to avoid, or to get rid of what was considered an unjust application of the Statute of Limitations, they extended that doctrine to a suit in equity. Whether at that time the doctrine had been generally so extended or not, is,

I think, exceedingly doubtful. Of course a suit in equity which might relate to a number of different matters might be continued to such a period of time that, if the doctrine extended to suits in equity, one might be compelled, if the case called for discussion and decision, to limit its application to some period or periods during the suit short of the final disposal of it.

For instance, in an administration suit you may invest the *property during the tenancy for life, which may [544 last fifty or sixty years, and you could not finally dispose of the property until the tenant for life died. Could you say, in a suit of that kind, that a retainer of a solicitor was of such a character that he could not be paid a single penny beyond his out-of-pocket costs against his client until the final conclusion of the suit? I for one am quite unable to arrive at that conclusion, even on the authority of the common law cases. Again, it might be very reasonable to say that the solicitor's right would arise at the first interlocutory order, that is, that he would be entitled to say, where an order had been made that accounts should be taken, that he had then earned his right to be paid, and was not bound to wait until the accounts were actually taken.

Why you should extend any such doctrine I am at a loss to see, nor do I intend myself to attempt to extend it. I cannot see any reason for assuming that a solicitor undertaking a business of this complicated nature, such as the administration whether of a dead man's estate or an insolvent man's estate, which may give rise to a score of suits, and may occupy a score of years before it is finally wound up, should be held to do a single and entire thing and not be entitled to be paid any remuneration until that single and entire thing is done. I think it is reasonable that a solicitor should not be held to have entered into such a contract.

That being so, we will see what the reason was which induced Baron Parke to lay down the principle. In the case of *Harris v. Osbourn* (1) that learned judge says this: "The cases which have been cited may be explained either upon the supposition that this is to be treated as a general contract, or upon the supposition that it is a special contract, to carry on the suit to its termination, subject to be put an end to on reasonable notice. In ancient times it was considered as an entire contract, of which the attorney could not divest himself by any means; but, in consequence

(1) 2 C. & M., 632.

of the increased expenses of suits in modern times, the rule has been varied, and the attorney is at liberty to determine the contract on reasonable notice. The contract of the client is to pay at the completion of the suit; and unless the contract be defeated by reasonable notice, the attorney 545] has no cause of action, and the Statute of *Limitations is no defence." As I understand it, it is said there that it is considered that, when a person undertakes to carry on a cause, he enters into a special contract to carry it to its termination. I do not mean to say that under no circumstances he can put an end to this contract, but it cannot be put an end to without notice. If he discharges himself he cannot get his costs. If the client does not choose to advance the proper funds, then the solicitor can divest himself of it, or get rid of it. That is under the same doctrine.

If a man engages to carry a box of cigars from London to Birmingham, it is an entire contract, and he cannot throw the cigars out of the carriage half-way there, and ask for half the money; or if a shoemaker agrees to make a pair of shoes, he cannot offer you one shoe, and ask you to pay one half the price. That is intelligible. In my opinion, in the case of a solicitor there is not an implied contract of that kind. It bears no fair relation to the doctrine of entire contract. It is a series of services which, though nominally in relation to one matter, is in reality in relation to a succession of matters, and it is not within the doctrine of entire contract, because it is not within the mischief of it. It is not reasonable that a solicitor should engage to act on for an indefinite number of years, winding up estates, without receiving any payment on which he can maintain himself. In my opinion it would be not only an unwise but an improper extension of the doctrine of entire contract to apply it to such a case as this. But, even if it were right, there must be a break somewhere. In the case of a Chancery suit I have shown what sort of break you may have. In the case of winding up there are all sorts of breaks. Is it to be supposed that, because a few matters are undisposed of, the solicitor is not to be paid until the final termination?

In this case there was a break when the arrangement was finally come to by which Mr. Sands became entitled to the whole of the assets. Then it was that his solicitors sent in their bill. I am told they have not asked for payment, but what did they send in the bill of costs for? Why, pending the relation between solicitor and client, is a bill sent in?

He could only have understood it as an application for payment, and there is no doubt he did so understand it, for they paid themselves *out of the moneys in their [546] hands. He knew they wanted payment, and when they sent him their second account he knew they wanted payment. It is quite true when they sent in the first account they said in effect, "This is not a final bill; there will be some more business to be done, but not a great deal more." I do not see anything in that beyond a notice to a client that the account did not include all the costs he would have to pay. The transaction amounts to this, in my opinion: "We have done so much work; there is a convenient break in the business, up to which time we have made up our bill of costs; please to pay us up to that time, and when the outstanding matters are concluded, which we hope will be shortly, we will send in a further bill."

As regards the case of *In re Street* (*), I cannot find that Lord Romilly decided the present point at all. I think he decided the case upon special circumstances. The point is not mentioned in the heading, and in the argument in the case of *In re Cartwright* (*) that case does not appear to have been so treated by Mr. Fry. I very much distrust myself, or any judge, in endeavoring to find a reason for a judgment where there are no reasons given; at the same time I cannot help saying that the circumstances in that case were very peculiar; it was not the ordinary case of solicitor and client at all; it was a case of a trustee entitled to sell real estate, and entitled to charge as solicitor as if he acted as solicitor for the trust. He sold the real estate as trustee. In fact he was his own client. He was the trustee to sell, and, as I read the case, he could not have charged the *cestuis que trust* anything; he only had a right to deduct out of the trust property the amount of his costs; that was his position. But he did send copies of bills of costs to some of his *cestuis que trust*, and two of them complained. If he could not make them pay, and it does not appear to me he could, it was not, I think, a case in which the question of delivery within the twelve months was the only point to be considered, because it was not a case of direct liability of the client to the solicitor; and it would seem also that, having a right to charge the trust fund, it might be well said that he could not pay himself until he had realized the trust fund, and paid all his charges. I do not say it was so, but it does *seem to me to distinguish the case [547] very much from the ordinary case of a transaction between

(*) Law Rep., 10 Eq., 165.

(*) Law Rep., 16 Eq., 472.

a solicitor and client where the client is personally liable to pay. Though I am quite unable to see what the exact view of Lord Romilly on the matter was, when I find that none of these common law cases were cited, and that the argument did not proceed on any such ground, and that no notice of any such ground is taken in the judgment, I think it was a judgment not directed to this point actually, but that it was one of the special circumstances which induced his Lordship to come to the conclusion at which he arrived.

I think, therefore, I am not hindered by any authority from deciding as I do now. So far as I may cite authority at all as bearing on the general question, the opinion, not final, but provisionally expressed in *In re Cartwright* (1) is entirely in accordance with the view which I take at the present moment. The summons will be granted as to the second bill only, and the applicant must pay the costs.

Solicitors : *Johnsons, Upton & Co. ; Denton, Hall & Barker.*

(1) Law Rep., 16 Eq., 469, 474.

The authority of an attorney employed to prosecute or defend an action, in the absence of special circumstances, continues by virtue of the original retainer until its final determination; the contract is single; no right of action accrues to him, and the statute of limitations does not begin to run against his claim for services, until his relation as attorney to the suit is ended: *Bathgate v. Haskin*, 59 N. Y., 538; *Lush v. Hastings*, 1 Hill, 656; *Mygalb v. Wilcox*, 45 N. Y., 306, affirming 1 Lans., 55; *Adams v. Fort Plain Bank*, 36 N. Y., 255, reversing 23 How. Prac., 45; *Davis v. Smith*, 48 Verm., 52; *Baker v. Johnson Co.*, 33 Iowa, 151; *McNiel v. Garland*, 27 Ark., 343; *Harris v. Wilson*, 2 Crompt. & Mees., 629; *Harris v. Quine*, L. R., 4 Q. B., 652; *Whitehead v. Lord*, 11 Eng. L. and Eq., 588, 7 Exch., 691; *Gustine v. Stoddard*, 11 N. Y. Week. Dig., 216.

Where however a party, expecting litigation, advised with counsel relative thereto, but were called upon for no further service, though they considered themselves retained until the dissolution of their partnership four years after: Held, that the statute of limitations began to run from the time of the consultation, the court saying "They (plaintiffs) were professionally bound to the defendant about that litigation

by his retainer; but they were not bound to wait any space of time for the pay for their services about the consultation and advice upon the subjects of the litigation. This question is different from those relating to charges for services by counsel in a suit actually pending, in which services were rendered from its commencement to its termination": *Adams v. Mott*, 44 Vt., 259.

Although an attorney may, within two years after he has recovered a judgment, acknowledge satisfaction thereon, yet upon a general retainer to collect, he is not bound to wait the two years before he can maintain an action against his client, to recover for his services in obtaining the judgment.

He has a perfect right of action against his client for his services in prosecuting suits for the collection of debts and recovering judgments and issuing executions, from the time the services are rendered, without any previous presentment of his account, demand or notice. And if an action is not brought within six years from that time, the demand will be barred by the statute of limitations.

In such a case the statute begins to run at least as soon as executions are issued, if not when the judgments are perfected.

The fact that the client, within six

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years before the commencement of a suit by the attorney for his services, collected several of the judgments in question, will not affect the claim of the attorney; it being, in any event, a legal demand against his client until it is paid, or barred by the statute: *Bruyn v. Comstock*, 56 Barb., 9.

The plaintiff's attorney sued in 1870 for bill of costs in suits brought for the defendant, in which suits judgment was entered, respectively, in 1860 and 1861,

and executions which were issued in 1863 had been renewed yearly at defendant's request until 1870:

Held, that the plaintiffs could not recover for any costs incurred before and in the entry of the judgments; for they were entitled on the recovery of judgment to sue for their bill, and were barred by the statute when they began to run: *Lizars v. Dawson*, 32 Upp. Can. Q. B., 237, distinguishing *Harris v. Quine*, L. R., 4 Q. B., 657.

[9 Chancery Division, 547.]

M.R., April 11, 1878.

*GETHING V. KEIGHLEY.

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[1877 G. 104.]

Partnership—Action for Account—Single Error—Liberty to surcharge and falsify—Errors appearing on Books.

Where an account is impeached, if a single important error is established, the court will not, except in the case of fraud, order the whole account to be opened, but will make a decree that the plaintiff may be at liberty to surcharge and falsify.

In a partnership action, where one error of £950 was established in an account long settled:

Held, that in taking the accounts the plaintiff should be at liberty to surcharge and falsify, and that such liberty should not be limited to errors appearing from the books.

By articles of partnership dated the 2d of November, 1857, the plaintiff and defendant entered into partnership as solicitors for *the term of fourteen years, and afterwards [548 continued in business as partners at will till the final dissolution.

There was only one general balance-sheet between the partners which extended from November, 1857, to the 31st of December, 1864. The account which was signed by both partners was in the handwriting of the defendant, who, as the plaintiff alleged, alone balanced and made up from time to time the books and accounts of the partnership.

The statement of claim alleged that the plaintiff had lately ascertained that the balance-sheet did not agree with the partnership books, and contained serious errors; the account marked "assets" was alleged to contain an entry of the sum of £1,950 "lent to Henry Gething," whereas no such sum was advanced to the plaintiff at any time, but in the month of January, 1865, and after the date to which the ac-

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counts were brought down in the balance-sheet, the plaintiff did receive a sum of £1,000, part of £1,950, the balance of which was retained by the partnership.

The plaintiff also alleged that there appeared in the account headed "Henry Gething's loan account," dated the 14th of May, 1863, an item, "To cash to you, £406," whereas no such sum was debited in the books of the partnership to the plaintiff, and the plaintiff believed that no such sum was ever paid to him. The plaintiff submitted that in taking the partnership accounts the balance-sheet ought not to stand as a settled account.

On the 9th of April, 1877, the plaintiff and defendant entered into an agreement that the partnership should be dissolved by mutual consent as from the 1st of January, 1877.

The plaintiff claimed a declaration that the partnership was dissolved from the last-mentioned date; that an account might be taken of all partnership dealings and transactions between the plaintiff and the defendant; and that a receiver might be appointed.

The defendant alleged that the plaintiff signed the account as correct, after full opportunity of examining the same; that he (the defendant) had ascertained since the dissolution, and admitted, that the sum of £1,900, stated as having been lent to the plaintiff, was incorrect, and ought to be £1,000 only; that the sum of £406, though entered erroneously as 549] a loan, was in reality due from the *plaintiff under another arrangement; that the balance-sheet had long been treated as settled, and claimed that it should be so treated.

The defendant was willing that the plaintiff should be at liberty to surcharge and falsify the same, upon comparison of the cash and other books and accounts kept by the plaintiff, but not otherwise.

Davey, Q.C., and *Decimus Sturges*, for the plaintiff: The books of the partnership show one clear error of a large amount in the balance-sheet, and another smaller error, which, though accounted for, tends to show that the books are untrustworthy. This being so, the plaintiff is entitled to have the whole account opened.

Chitty, Q.C., and *Russell Roberts*, for the defendants: The defendant does not deny that there is one error of a large amount, but that alone, no fraud being alleged, is not sufficient to entitle the plaintiff to have the whole of a settled account opened. The proper form in which the account should be directed is for the plaintiff to have liberty to surcharge and falsify. This, however, should be limited to

errors appearing on the partnership books, which should be taken as *prima facie* evidence, as in *Ewart v. Williams* (*).

[The following cases were referred to: *Taylor v. Haylin* (*); *Allfrey v. Allfrey* (*); *Coleman v. Mellersh* (*); *Millar v. Craig* (*); *Pritt v. Clay* (*); *Williamson v. Barbour* (*).]

JESSEL, M.R.: I have no doubt myself as to the law on the subject. The statement of claim asks to open a settled account which has been settled a very long time. It alleges two errors, one of which is certainly proved, and it is a very considerable error. It is an entry of a sum of £1,950 which ought to be £1,000; that is, there is an error of £950 in a single item of £1,950. The other error *alleged is a [550 sum of £406, which is really not an error in substance, because it ought to be charged; and £406 is actually charged. It is an error in form. It charges that as a loan, which was the result of another arrangement, which would have made the plaintiff liable; and, although, being in substance right and in form wrong, it would not be a ground for opening the account, it does assist in inducing me to think that the account is not trustworthy. But, irrespective of that, I should have given the plaintiff relief on the ground of the one larger item.

I think the old case of *Taylor v. Haylin* (*) shows that a single important error alleged and proved is sufficient to entitle the court to open the account if it thinks fit to do so—especially as the court must look at the nature of the account—either by opening it altogether or by surcharging and falsifying. That is stated most distinctly, as I read the judgment of Lord Cottenham in *Coleman v. Mellersh* (*), which refers to a single error; and the same point was actually the foundation for a decree for opening the accounts altogether where there was a single error of £2,000, in *Pritt v. Clay* (*). So that we really have exact decisions on the point that one error alleged and proved will do, and there is a great deal of good sense in it. The court sees from the nature and amount of the error that the accounts could not have been properly taken, and therefore that they cannot stand. The nature of the relief of course must depend on circumstances. It was decided by Lord Cottenham in *Allfrey v. Allfrey* (*)—and I stated in the recent case of *Williamson v. Barbour* (*) my intention of adhering to that principle to its full extent—that where a single item com-

(*) 7 D. M. & G., 68.

(*) 2 Bro. C. C., 310.

(*) 1 Mac. & G., 87.

(*) 2 Mac. & G., 309.

(*) 6 Beav., 433.

(*) Ibid., 503.

(*) *Ante*, p. 529.

plained of was a fraudulent item, the proper order to make was to open the accounts altogether; but where the item complained of is not a fraudulent item, and the accounts are of some years standing, as these are, I should say that the proper order was only to give liberty to surcharge and falsify.

The rule is clearly laid down in *Davies v. Spurling* (*) by Sir John Leach, who says this (*): "In order to induce the 551] court to *make a decree that the plaintiffs are to be at liberty to surcharge and falsify accounts, it is necessary that there should be established in the progress of the suit some one mistake with respect to an item in the accounts. It is not necessary for that purpose to establish more than one mistake, it being in the view of the court a reasonable inference that if there be one mistake there may be many mistakes; and the plaintiff therefore ought to have the liberty of entering fully into those accounts with a view to proving other mistakes."

The same point exactly came before Lord St. Leonards when he was Lord Chancellor of Ireland in the case of *Lawless v. Mansfield* (*), where he says (*), "I shall inquire what the rule of the court is before I enter upon the consideration of the items alleged to be erroneous. In ordinary cases the rule seems to be that the establishment of one mistake is sufficient to induce the court to give a decree entitling the party to surcharge and falsify an account."

But there may be cases where the defendant is entitled to say that although the plaintiff only asks to surcharge and falsify he would not have settled the account at all had he been aware of the mistake, and he may insist on the accounts being taken *de novo*. There may be such a case, at the same time one cannot help feeling that where accounts have been long settled it is fair to both parties, in the absence of fraud, to give them merely liberty to surcharge and falsify, because that allows the account to stand, and only rectifies it in instances in which the person complaining can clearly prove that there has been an error. I think that is the right form of order to make here, and I make it accordingly.

The defendant asks to limit the right to surcharge and falsify to errors appearing on the books. I am very unwilling to make a new precedent as to the form of taking accounts; and besides, that is not necessary under either the general law or the terms of the act 15 & 16 Vict. c. 86, s. 54,

(*) Tam., 199.

(*) 1 D. & War., 557.

(*) Tam., 211.

(*) 1 D. & War., 603.

by which the court has power to make the books *prima facie* evidence. In many cases, as in partnership cases, they are evidence by virtue of the general law, independently of the rules and power of the court. Therefore the books *are admissible in evidence; but why should [552 I make entries in those books conclusive evidence if the person complaining of them can by clear evidence at this distance of time show that there is an error in the books? Where there is a question of surcharging and falsifying accounts, the case alleged must be clearly proved by the person impeaching them, and if there is any doubt it will be determined against him. Then it must be considered that now the judge himself takes the account, that is to say, it is taken under his supervision, and that if any specific direction is required from the nature of the case by reason of the loss of documents or vouchers, or the loss of memory or other special things, he can take it into consideration in chambers, and give specific directions. Therefore there is no occasion to incur the judgment or decree by giving this specific direction. It is far better to give that when the occasion arises than to run the risk of committing injustice by giving a general direction, which may not be found fairly applicable to the peculiar circumstances of the case, which can only be judged of when the accounts are taken.

Solicitors: *H. Gething; J. N. Keighley.*

See *Williamson v. Barbour*, ante, p. 809.

[9 Chancery Division, 552.]

M.R., May 24, 1878.

WILSON V. CHURCH.

[1878 W. 81.]

Parties—Officer of Corporation, Joinder of, as Defendant for Purpose of Discovery—Rules of Court, 1875, Order xxxi, r. 4; Order xvi, r. 14—Representative Action on behalf of Bondholders—Dissentient Bondholder joined as Defendant—Practice—Absent Parties—Form of Proceeding.

In an action against a corporation, where an officer of the corporation against whom no relief was claimed was made a defendant for the purpose of discovery:

Held, on motion, that, inasmuch as under Rules of Court, 1875, Order xxxi, r. 4, such discovery could be obtained by an order to deliver to him interrogatories, he was improperly joined as defendant, and that, under Order xvi, r. 14, his name should be struck out.

In a representative action by a plaintiff on behalf of himself and all other bondholders:

Held, on motion, that a dissentient bondholder—it not appearing that there were *any others who dissented—should be added as a defendant, but not in a [553 representative character.

Such applications should, in general, be by summons in chambers.

In an interlocutory application with which some of the parties to the action who had no interest in such application were not served, an order *nisi* was made to be binding on the absent parties three days after service unless they showed cause.

THIS was a motion on behalf of some of the defendants to an action in which in the first instance W. M. Wilson was sole plaintiff, but in which by amendment the plaintiffs were the said W. M. Wilson (on behalf of himself and all other the holders of the bonds of the Republic of Bolivia, issued in respect of a certain loan), and the Republic of Bolivia. The defendants were Colonel Church, and National Bolivian Navigation Company (of which Colonel Church was chairman), the Madeira and Mamoré Railway Company (of which Colonel Church was also chairman), J. H. Lloyd and A. J. Lambert (who were trustees for the said bondholders), and others. The original writ claimed relief against Colonel Church, but this was abandoned, and the amended statement of claim alleged that he was retained as a defendant for the purpose of discovery against the navigation company and the railway company.

By the amended statement of claim the plaintiffs alleged that a certain engagement had been entered into between the bondholders and the Bolivian Government, and claimed a declaration that a certain trust fund in the hands of the defendants Lloyd and Lambert ought not to be applied in payment for the works of the railway, and that it should be returned to the bondholders, and that these defendants might be restrained by injunction from making any payment out of the trust fund to the navigation company or the railway company, or otherwise dealing with it.

The present motion was made on behalf of the first three defendants, namely, Colonel Church, the navigation company, and the railway company, and also on behalf of Llewellyn Nash a bondholder, to have the name of Colonel Church struck out, as being merely a formal defendant, and made so for purposes of discovery, also to have the name of Llewellyn Nash, a bondholder who had not adopted the engagement made by the plaintiffs with the Republic of Bolivia, added as a defendant to represent such of the bond-
554] holders *as dissented from that arrangement, also to have the record amended by making the plaintiff sue only on behalf of those bondholders who had accepted the arrangement. The other defendants were not served with the notice of motion.

Llewellyn Nash stated in his affidavit, in support of the motion, that the plaintiff Wilson did not represent the in-

terests and wishes of all the bondholders, and in particular did not represent his own; but the affidavit did not state that any of the other bondholders concurred with Nash.

Chitty, Q. C., *Davey*, Q. C., and *Rigby*, in support of the motion.

Southgate, Q. C., *Fooks*, Q. C., and *Cozens-Hardy*, for the plaintiffs: The old practice of the Court of Chancery, by which an officer of a company was made a defendant for the purpose of discovery, is still in force. Order xxxi, rule 4, of the Rules of Court, 1875, is an additional provision, but not inconsistent with the old practice. The plaintiffs have a right to keep Colonel Church before the court.

It is premature at the present stage to add Mr. Nash as a defendant, and moreover it cannot be done in the absence of the other defendants.

JESSEL, M. R.: The point which has now been under discussion I should have thought was one not open to discussion. The new act of Parliament, as I understand it, abolishes the old system of pleading both at common law and equity, and substitutes a new one which is to be found set forth in the schedule to the act, and is therein described in a very full way, but it is preceded by the following note: "Where no other provision is made by the act or these rules, the present procedure and practice remain in force." The only question I have to decide, therefore, is, whether there is provision made by the act or rules for obtaining discovery from a corporation in defending an action. If there is provision made, there is an end of all the old practice, and that provision only applies.

*I turn to Order xxxi, "Discovery and Inspection." [555] I turn to rule 4, and I find there is provision made for obtaining discovery from a corporation: "If any party to an action be a body corporate or a joint stock company, whether incorporated or not, or any other body of persons, empowered by law to sue or be sued, whether in its own name or in the name of any officer or other person, any opposite party may apply at chambers for an order allowing him to deliver interrogatories to any member or officer of such corporation, company, or body, and an order may be made accordingly." That appears to me to point out plainly what the course to be pursued under the new system of pleading is, and the only course to be pursued when no other is authorized. Nothing could be more vexatious or annoying to a man than to be made a party to an action in which he has no interest, where he is a mere servant of

another, and where he may be exposed to a large amount of expense in the shape of costs wholly without necessity.

When we come to look at the history of the legislation, we shall see that not only is this the plain meaning of the rule—which I should have held independently of any history—but also how it arose. The defect of the old common law system was, that it did not allow you, in an ordinary action at law, to obtain discovery from your opponent, and equity therefore invented the bill of discovery in aid of the plaintiff in the action, or of the defendant in the action, and gave that discovery, and, of course following its own rules as applied to actions at law, it gave a similar remedy where it was a suit in equity. Then came this difficulty, that a corporation answering not on oath, but under common seal, you could not indict the corporation for perjury, and you could not therefore have the usual remedy or sanction which enabled you to rely on the discovery, and so, to avoid that, the courts of equity allowed you to add an officer of the corporation as defendant, to make him answer on oath, because, according to the then procedure, you could not interrogate him in any other way. You were therefore compelled to make him a defendant. In process of time the Legislature thought fit to get rid of the necessity of resorting to courts of equity for discovery, by empowering the courts of law to give discovery in common law actions. Then [556] what did the Legislature do? It did not adopt *the method which was adopted by the courts of equity in suits in equity. That method was both cumbrous and expensive.

In the case of an officer made a defendant, he had to get his costs from the plaintiff if he could, and if he could not, he would have to bring a separate action against his employers for the purpose of indemnifying him against the costs of his defence. In the case of an ordinary bill of discovery, as we know, the courts of equity could not deal with the costs in any other way. The plaintiff got discovery, and the defendant was entitled to make the plaintiff pay the costs of it, and he got his costs whatever was the result of the action. Nothing could be more cumbrous, and in many cases nothing could be more unjust than that the person who was right in the action should have to pay the costs of the discovery which enabled him to proceed. Then when the Legislature interfered, and interfered as usual in a piecemeal way, it merely gave the right of discovery in a common law action without interfering with the suit for discovery in equity; and the way in which it did it was this—by enacting the provisions of the 51st section of the Common

Law Procedure Act, 1854, which is almost in the words of the provisions of Order xxxi, rule 4; that is, recognizing the impropriety of making the officer a party to the action at common law, it enabled the person requiring a right to discovery to get an order to examine the proper officer on interrogatories. Then, of course, the parties to the action paid all the costs of the proceedings and the officer gave discovery, and had nothing further to do with the action.

When the Legislature inaugurated a totally new system of pleading, and established a new court of justice—for that is what the High Court is—the first question was, what system should they adopt in it, as there must be one system for all kinds of actions whether common law actions or equity actions, and they adopted the rule which had been adopted in common law actions, and that is the rule inserted in the schedule to the act. There is no other practice extant applicable to equity actions. The old practice has ceased to exist. There is only one kind of action, and one kind of procedure, and that is the procedure pointed out by Order xxxi, rule 4.

Then it is said, in this particular instance Colonel Church is *the proper man to give discovery. The answer [557 is, that will be decided at chambers if you ask for interrogatories to examine Colonel Church, because it is allowed to deliver interrogatories to any member or officer of such corporation. It is for the court to decide which member is to be interrogated, and if you show reasons why one member can give the information and not another, or why one member can give information on one set of questions, and another member on another set of questions, the court can direct which member or members shall be examined to give information. Therefore, there is no hardship on the plaintiff to make him come and deliver interrogatories pursuant to the order of the court. It appears to me, therefore, that Colonel Church is improperly made a party where he is made a party for the purpose of discovery only.

In this particular instance, there is no question that he is made a party for the purpose of discovery only, for the pleader has said so. There are cases in which it may be a matter of some difficulty to determine. You will have to read the pleadings and see, where a man is made a party against whom no relief is claimed in form, whether he is made a party for the purpose of discovery, or whether he is made a party with a view to find out his interest. But in this case no such question can arise, for the pleader has said so in so many words.

Then having arrived at the conclusion that he is improperly joined, what am I to do with him? I think again, that here the Legislature has pointed out exactly what I am to do with him. Order xvi, rule 13, says this: "The court or a judge may, at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court or a judge to be just, order that the name or names of any party or parties, whether as plaintiffs or as defendants, improperly joined be struck out." Now there is no doubt that the court may do so now because it may do it at any stage of the proceedings. If you came to the trial it would be absurd to strike him out, because you would dismiss the action. But what it means is this, if at any stage an application is made to strike him out, and it is proper to strike him out, of course the court will strike him out. In the same way, if there are 558] parties who ought *to have been joined, the court may order a plaintiff or defendant to be joined or added. Then if it is brought before the court at the proper time, and if it is in time, of course the court may do it if it thinks proper. But it is absurd to say that the court "may" do so, if it did not mean that it was the duty of the judge to add the party if the proceedings were in such a state that the party could properly be added. The Legislature were obliged to say "may," because it might be at any stage of the proceedings.

Then that being so, there being no pretence for saying this is not a proper stage, I order that the name of Colonel Church be struck out; and not only that he should be struck out, but that the plaintiffs should pay his costs, because he was made a party improperly from the beginning, and as there has been an abandonment, that they should pay the costs of abandonment. When they amended by saying he was made a party for discovery only, the action ought to have been discontinued against him. Therefore I order his name to be struck out, and I order them to pay his costs up to and including the date of the motion.

I will say a word about these kinds of application. I think these applications, as a general rule, should be made by summons at chambers. In this case it has been made by motion, but the motion has been resisted on a question of pleading, and on a question as to the construction of the act of Parliament. If such a question had been raised at chambers, I should have adjourned the matter into court for argument. Therefore, no extra costs have been incurred

in respect of that, and I think Colonel Church is entitled to his full costs of motion.

There is another part of the motion, by which I am asked that Mr. Nash be joined as a party under Order XVI. rule 14.

The matter arises in this way: the plaintiffs, or some of them, claim to represent the holders of the bonds of the Bolivian loan. They allege that they represent them all, and that it is for their benefit that a certain arrangement should be carried out. Mr. Nash says he is the holder of a very large number of these bonds, and he takes an opposite view to that of the plaintiffs, and he says that they have no right to represent him, and he does not wish to be represented by them. That being so, he applied to me for an order that he be made a party as defendant; and he further *applied that he should be entitled to repre- [559 sent all the dissentient bondholders. As regards the latter claim, inasmuch as Order XIV, rule 9, requires that there shall be "numerous parties" where one defends on behalf of others, and as he has not proved that there is anybody who dissents but himself, it is quite clear that I cannot make him a party in a representative way, and he cannot be a representative without a constituency. That is not the modern practice of legislation or pleading; but it does not at all follow that he is not entitled to be made a party. He has an interest even as an individual. He says, in effect, "my rights will be affected," and they certainly will, if judgment is given in favor of the plaintiffs, "and I insist that I should be here to dispute the contention of the plaintiffs." I think that is too plain for argument. He not only has an interest but a substantial interest. As there appears at present to be only one bondholder dissenting, the right course is to add him alone as a defendant, and then, as it appears to me, the rules provide what is to be done, and if any unnecessary delay takes place, my chambers are open to any application which may be made on that account.

As regards the costs of the application I shall make them costs in the action, and shall do so as a general rule, because it must depend on the result of the action whether or not the person who wishes to be added is properly added. If he is right the action will be dismissed with costs, and if he is wrong he will have to pay them. The only difficulty is that this motion has not been served on some of the defendants, and as a general rule these applications should be made in the presence of all the defendants, and as regards the

course to be pursued on these applications, this, again, as a rule, should be by summons at chambers.

Here, again, I do not say it was wrong to make a motion, because, looking at the importance and nature of the case, and the kind of argument likely to be addressed to me, I have no doubt that I should have adjourned this summons into court also, but, at the same time, litigants must understand that if they serve notices of motion in the first instance instead of taking out a summons, they take the risk of the court being of opinion that it was not a proper case to be adjourned into court. And therefore it is safer in all cases to proceed by summons in the first instance.

560] *As regards the technicality of the other defendants not being served, I may state that on this question the other defendants have no substantial interest, and would not wish to be heard. That being so, I think it is a convenient mode, instead of allowing the motion to stand over and add to the expense and delay by serving all those people who have, as I said before, no interest in the matter, that I should make a conditional order that it shall be binding on them three days after service. If they show cause to the contrary, or have any objection to make, they will apply to me, and then, of course, I must consider it.

Solicitors: *Wilson, Bristows & Carpmael; W. W. Wynne.*

See 22 Eng. Rep., 655 note; 13 Eng. Rep., 758 note.

A stockholder of a corporation may maintain an action in his own name and in behalf of all others similarly situated, to recover of a trustee, property of the corporation which the trustee has converted to his own use, the corporation being made a party defendant: *Carpenter v. Roberts*, 56 How. Pr., 216; *Graves v. George*, 69 N. Y., 154, 49 How. Pr., 79.

An individual stockholder cannot maintain a separate action at law against the directors of a corporation for damages sustained by reason of the negligence of the directors. The remedy of the stockholder must be in a form to protect the interests of the corporation, as trustee for all the stockholders and the creditors: *Craig v. Gregg*, 83 Penn. St. R., 19.

An individual stockholder cannot prosecute an appeal from a judgment against a corporation of which he is a

member: *State v. Florida*, etc., 16 Florida, 690.

Stockholders of a corporation which is a defendant in a suit in equity cannot acquire a standing in court to protect the interests of the corporation, by an informal petition which lacks the essential elements of a cross-bill: *Fifth National, etc., v. Pittsburgh, etc.*, 13 Chic. Leg. News, 51, U. S. District Court, Western Dist. Penn.

In an action to recover damages for the alleged fraudulent issuing by defendant of a certificate of fifty shares of plaintiff's stock, he filled up a blank certificate which had been intrusted to him as plaintiff's treasurer; defendant testified that the stock was given to him by bondholders of the company who were entitled thereto. Defendant was also a director of the plaintiff. Held that the jury were not bound by defendant's testimony although undisputed, he being an interested witness, and it not appearing that he disclosed

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the gift to plaintiff's directors, or claimed that he was equitably entitled to the stock when disputes arose concerning the transaction.

Also held, that even if the creditors of the plaintiff were willing to waive their right of any of the stock, he, while acting for plaintiff, must be held to have received the waiver as agent for it and not for his own benefit.

Defendant was notified soon after the transaction that plaintiff would not acquiesce in the transfer; he was a large, if not a controlling stockholder as well as director; while he remained such no action was taken against him, and an adverse report of an investigating com-

mittee of the directors was not acted upon; meanwhile the stock passed into the hands of a *bona fide* purchaser. Held, that the delay to prosecute was not, under the circumstances, a waiver of the right of action, and that plaintiff was not estopped from recovering damages for the fraud: *Brooklyn Cross-town R. R. Co. v. Strong*, 75 N. Y., 591.

Where one creditor commences an action against a corporation "in behalf of himself and all others interested, either as creditor or stockholder," he may discontinue the same at any time before the entry of judgment, without the consent of the other creditors: *Tremain v. Guardian, etc.*, 11 Hun, 286.

[9 Chancery Division, 560.]

M.R., June 29, 1878.

MERCHANT BANKING COMPANY OF LONDON V. MERCHANTS' JOINT STOCK BANK.

[1878 M. 174.]

Limited Companies—Identity of Names—Registration—Injunction—Intention to deceive—Companies Act, 1862, s. 20.

There is nothing in the Companies Act, 1862, to affect the right of a company registered under a particular name to an injunction restraining another company which, notwithstanding the prohibition of sect. 20 against identity of names, has been registered under an identical or a similar name, from carrying on its business under that name, if it is proved that that name is calculated to deceive; the principles applicable to individuals trading under identical or similar names applying equally to companies.

THIS was a motion on behalf of the plaintiffs, The Merchant Banking Company of London, Limited, for an injunction to restrain the defendants, The Merchants' Joint Stock Bank, Limited, from using the style or name of "The Merchants' Joint Stock Bank, Limited," or any other style or name so nearly resembling the plaintiffs' name as to be calculated to deceive.

The plaintiff company was established in 1863, with its registered office and place of business in Cannon Street, in the city of London, and, according to the evidence, had since acquired considerable reputation among the city mercantile community, being *generally known by the [561] short title of the "Merchant Banking Company," or "The Merchant Bank."

The defendant company was incorporated in March, 1878,

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and had its registered office and place of business in Great Russell Street, Bloomsbury. Its object was to afford increased banking facilities to the retail tradesmen of Tottenham Court Road and the neighborhood.

In June, 1878, the manager of the plaintiff company wrote to the secretary of the defendant company, stating that the name of the latter company so closely resembled the name of the former as to lead to the certainty of some confusion, and requesting that steps might accordingly be taken by the defendants to alter their name.

From the correspondence which then ensued, and which was in evidence, it appeared that the defendants had originally applied to be registered under the name of "The Mercantile Joint Stock Company, Limited," but that the Registrar of Joint Stock Companies refused to register that name on the ground that there was already on the register a "Mercantile Bank, Limited;" and that three or four other names were then submitted to the Registrar, one of them being the defendants' present name, which the Registrar finally approved and registered.

The defendants ultimately declined to alter their name, and hence the present motion.

There was no evidence that any person had been actually misled by the similarity of name, and the defendants positively denied that they had any intention of injuring or in any way interfering with the plaintiffs' business.

Davey, Q.C., and H. B. Buckley, for the plaintiffs: These names are substantially identical, and identity of names in companies is prohibited by the Companies Act, 1862, s. 20, which prescribes the steps to be taken where, through inadvertence or otherwise, a company has been registered by a name identical with that of a subsisting company.

Dundas Gardiner, for the defendants: This is not an 562] application under the 20th section, which *moreover does not make it obligatory upon a company to take steps for changing its name when once registered. It is merely an enabling section. Here we were duly registered by the Registrar after full consideration: he must therefore be taken to have thought that our title was not calculated to deceive, and there is no evidence whatever that a single person has been in fact deceived.

Applications similar to this were refused in *Colonial Life Assurance Company v. Home and Colonial Assurance Company, Limited*⁽¹⁾, *London Assurance v. London and Westminster Assurance Corporation, Limited*⁽²⁾, and *Lon-*

⁽¹⁾ 88 Beav., 548.

⁽²⁾ 32 L. J. (Ch.), 664.

don and Provincial Law Assurance Society v. London and Provincial Joint Stock Life Assurance Company (').

Davey, in reply: We rely on the fact that the defendants are using a name similar to ours, from which we ask your Lordship to infer an intention to deceive. It is enough that the name has a tendency to deceive, according to the well-established rule that a business must not be carried on under a name calculated to mislead; the right to a trade name standing on the same footing as a trade-mark: *Burgess v. Burgess* ('); *Croft v. Day* ('); *Churton v. Douglas* ('). To entitle us to an injunction it is not necessary to prove any instance of actual deception: *Braham v. Beacham* (').

It could never have been the intention of the act that the mere fact of the registration of one company took away rights already existing in another company.

Here it is proved that the plaintiffs are generally known as the "Merchant Banking Company," or the "Merchant Bank," the word "Merchant," being the leading or key-word, which is common to both these companies. In the three cases cited on behalf of the defendants there was no such key-word. We submit, therefore, that the use of the word "Merchant" by the defendants is calculated to deceive or mislead, and should accordingly be restrained.

*JESSEL, M.R.: I think that the act of Parliament [563 does not affect the plaintiffs' right to make this motion.

As the law originally stood I think that any person might use his own name for the purpose of trade, and might use any fancy name for the purpose of trade. If a man's name was Brown or Jones, he was not compelled, according to the common law, to carry on trade under the name of Brown or Jones, but might carry on trade under any fancy name he chose, and the mere fact of somebody else having the same name and carrying on trade under that name does not prevent another person from doing the same. If John Brown sells coals, another John Brown may sell potatoes, and there is no law that I know of to prevent him from selling his potatoes under the name of John Brown; the first John Brown could not in such a case restrain the second John Brown from carrying on trade under his own name.

Again, nothing can be plainer than that if the first John Brown carried on business under the name, not of John Brown, but of John Brown & Co., so might the second.

(1) 17 L. J. (Ch.), 37.

(4) Joh., 174.

(2) 3 D. M. & G., 386.

(5) 7 Ch. D., 848; 25 Eng. R., 55.

(3) 7 Beav., 84.

What the law did prevent was fraud ; and it prevented not only actual fraud, that is, fraud intentionally committed, but it also prevented a man from carrying on business in such a way, whether he knew it or not, as to represent that his business was the business of another man. And it might happen that the mere using a well known fancy name would be evidence of an intention on the part of the person using it to commit a fraud. One can well understand a certain fancy name being so attached to a business as to indicate that business and that business alone, and that another man using the same fancy name in carrying on a similar business might be convicted of an intention to defraud from that circumstance alone. That might well be, but still after all it is merely a question of evidence.

Now, we have had the question before the courts of equity over and over again. There is the well known case of *Croft v. Day* ⁽¹⁾—the case of Day & Martin, the blacking makers in Holborn—in which there was no longer either a Day or a Martin, as in the original firm, both being long since dead, 564] and the persons before the court who then carried on their business, deriving title under them, were held entitled to restrain a real “Day” and a real “Martin” from trading under the name of “Day & Martin” as makers of blacking, because it was a manufacturer of the well known firm of “Day & Martin ;” the reason for the injunction being that the name of “Day & Martin” had been adopted for the purpose of representing and holding out to the public that it was the old firm of “Day & Martin.”

There is another well known case, I believe unreported, that of Mr. Newman, the colorman of Soho Square. It was held, that he was entitled to restrain another “Newman,” a person who bore the name of “Newman,” from setting up a shop as colorman a few doors off, and advertising himself as “Newman & Company.” There the court held that there was an intention to appropriate the first Newman’s business under the pretence of *bona fide* trading under that name.

Now, before the act of Parliament, there was nothing in the world to prevent a man registering, for instance, the “London and Liverpool Company,” for the purpose of trading in cheese, and another man registering a company under the same name for the purpose of trading in timber—a different trade—and although the name was identical, there was no equity in the first company to prevent the second carrying on its business. But then came an act of Par-

(1) 7 Beav., 84.

liament which prohibited the registration of the same name in the case of companies, for by the act of 1862 a direction was given to the Registrar of Joint Stock Companies that he should not register two companies under the same name, quite irrespective of the fact whether the business carried on was the same or not. The act said (sect. 20) that "No company shall be registered under a name identical with that by which a subsisting company is already registered, or so nearly resembling the same as to be calculated to deceive," except in certain cases. Then it goes on thus: "If any company, through inadvertence or otherwise," is so registered, then the company "may, with the sanction of the Registrar, change its name"—it cannot change its name without; it may be restrained from carrying on business, I suppose, in a proper case, still it cannot change its name without the sanction of the Registrar.

*Now, take the case I put before, of the cheese com- [565] pany and the timber company being both registered, it is quite plain there could be no injunction; and in that case, when they are once registered, the act no longer applies. You cannot force either to change its name; so that really the right after registration is exactly the same right as before. Either company has a right to say, We are not prohibited by law carrying on trade under that name; the act does not prohibit us.

That being so, I must consider what the facts of this case are, and they are very few and very simple. There is an old established bank, the plaintiffs', The Merchant Banking Company of London, Limited, carrying on business in Cannon Street, in the city of London. In the spring of this year a new bank starts—a bank of an entirely different description, carrying on business in Bloomsbury, the one being in the city, having to do with merchants, the other being at the West End, and having to do with people who may be called merchants, and I think, according to the dictionary and by common usage, they are entitled to be called merchants, but still not quite merchants of the same class as the others. I speak with some hesitation as to the meaning of the word, but I see the Imperial Dictionary gives the meaning of the word as "any dealer or trader," and no doubt that definition would include potato merchants, and coal merchants, and wine merchants, and all sorts of people who are not usually called "merchants," standing alone; though I should have thought myself the common use of the word "merchants," standing alone, meant something very different.

That being so, these are certainly both merchants' banks ; there is no fraud in the defendant company in calling itself the "Merchants' Bank," as it is intended to accommodate the traders of the neighborhood, who, according to the dictionary, are entitled to be called or may call themselves "merchants." I do not think, therefore, there is any fraud on the part of the defendants really shown. The intention to commit fraud is expressly denied by their affidavits, and I cannot imagine what object they could have had in starting in Bloomsbury if they intended to take away the business of a well-established bank in Cannon Street.

Looking at these facts, I am of opinion that no fraud was 566] *intended—that it is a mere accident that the names are so closely alike. As regards the defendants, it appears from the evidence that originally they did not intend to call themselves "merchants," but "mercantile," and that the Registrar refused to register "mercantile," as there was a "Mercantile Bank" already on the register, but that he selected the word "merchants" out of three or four names that were submitted to him, and finally registered that. I have no doubt that so far really there was no fraud intended by the defendants, and no desire on their part to appropriate the business of the plaintiffs for themselves.

The sole remaining point I have to consider is this : Is the name so similar that I must impute to the defendants an intention to appropriate the plaintiffs' business? Now, what I conceive would, in a case of this kind, amount to very clear evidence indeed of such an intention, would be where a man, say, of the name of Coutts, took a house in the Strand, and put up over the door "Coutts & Co." I should have no hesitation, upon those facts, in saying that he intended to attempt to appropriate the business of Messrs. Coutts & Company; but, as I said before, the localities here being different, what are the names? The names of the plaintiffs are "The Merchant Banking Company of London, Limited," and the names of the defendants are "The Merchants'" (in the plural) "Joint Stock Bank, Limited." In my opinion, there is not sufficient similarity in the two names necessarily to lead to the inference that there was an intention to deceive. As we know, in the case of these companies there are so many under similar names that people do look out for themselves; and here there is no pretence for saying any one has been deceived, or that any confusion has arisen through the similarity of name.

Now, when I come to look at the authorities—and there are three to which I have been referred—I must say they do

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not afford me so much assistance as I should desire; but they do give this remarkable result, that in every case where an injunction has been applied for it has been refused.

The only cases that I will mention are these. There is first the case of *London and Provincial Law Assurance Society v. London and Provincial Joint Stock Life Assurance Company* ⁽¹⁾. There *the ground of the motion [567 was that inconvenience or damage would arise to the plaintiffs from the use by the defendants of a similar name, and they said in fact that it was usual to designate the plaintiff society by the words "London and Provincial Insurance Company." There the Vice-Chancellor refused the injunction.

The next case is that of the *London Assurance v. London and Westminster Assurance Corporation, Limited* ⁽²⁾, which came before another Vice-Chancellor. There again the plaintiffs were an old corporation, the "London Assurance." The other company was just starting, in the same business of course. But the Vice-Chancellor said he did not think it a case for an injunction, and refused to make any order.

The third case is that of the *Colonial Life Assurance Company v. Home and Colonial Assurance Company, Limited* ⁽³⁾. The plaintiff company there was established in 1846, and the defendant company in 1864, and of course the application was made soon afterwards. There Lord Romilly, considering that the company was established to do colonial business, and was *bona fide* established as a new company, held there was no right to the injunction, merely from the similarity of the names.

The only other case of which I am aware is a case before myself about a fortnight ago, in which a similar application was made by the *London and County Banking Company v. Capital and Counties Bank*. There, following the cases, I thought that the mere similarity of the names was not sufficient to show any intention to appropriate, or any possibility of appropriating, the plaintiff's business, and I refused the injunction.

In this case I am quite satisfied that there never was an intention on the part of the defendants to appropriate, nor a probability of their appropriating the plaintiffs' business; and I am also satisfied that there is not likely to be any

⁽¹⁾ 17 L. J. (Ch.), 37.

⁽²⁾ 32 L. J. (Ch.) 604.

⁽³⁾ 33 Beav., 548.

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damage or injury to the plaintiffs at all from the act of the defendants; and that being so, I refuse the injunction. The costs will be costs in the action.

Solicitors: *Flux & Co.*; *G. Rose Innes & Son.*

See 24 Eng. Rep., 296 note.

It is essential to the idea of a trade-mark, by which any particular manufactured article is designated, that the mark should be annexed to or stamped, printed, carved, or engraved upon, the article as the same is offered for sale; and, if the article has not been thus distinguished, its manufacturer cannot be said to have appropriated any particular trade-mark: *St. Louis Piano Manufg Co. v. Merkel*, 1 Mo. App., 305.

One has a right to label his goods with his own name, or that of his mill, if no fraudulent purpose is intended: *Carmichael v. Latimer*, 11 R. L., 395; *England v. N. Y.*, etc., 8 Daly, 375.

To entitle a party to relief for an alleged infringement of a trade-mark, the resemblance of the simulated to the genuine trade-mark must be such as to amount to a false representation, which is liable to deceive the public, and enable the imitator to pass off his goods as those of the person whose trade-mark is imitated. When ordinary attention on the part of customers will enable them to discriminate between the trade-marks of different parties the court will not interfere: *Popham v. Cole*, 66 N. Y., 69, 23 Am. Rep., 27 note, affirming 38 N. Y. Superior Ct. R., 274, 14 Abb. (N.S.), 206; *Osgood v. Allen*, 1 Holmes, 185; *Partridge v. Menck*, 2 Sandf. Chy., 622; *Talcott v. Moore*, 6 Hun, 106; *Wolfe v. Hart*, 4 Victorian Law Rep., Eq., 125; *Chiun v. Thomas*, 5 Victorian L. R., Eq., 188.

A person has the right to use his own name as a trade-mark to designate an article which he produces and sells, although another person of the same name has previously produced and sold the like article with the same designation, and has made use of the designation as valuable.

Where, however, the latter use of the designation in such a case is made for the purpose of leading the public to believe that the articles so designated are those of the prior user of the designation, and thus depriving such

prior user of his gains, the court will restrain such dishonest use.

The test is, whether he uses the name honestly and fairly in the ordinary prosecution of his business, or dishonestly to palm off his own commodity as the production of another: *England v. The New York Publishing Co.*, 8 Daly, 375.

The doctrine of relief in equity against infringement of trade-marks rests upon the principle, that no one should be permitted so to dress his goods for sale as to enable him to induce purchasers to believe that they are the goods of another.

To sustain an action in a state court for an injunction against an infringement or imitation of trade-mark or labels, plaintiff, although his label contains a registered trade-mark, need not prove an imitation of that mark. It is enough if the general effect of the defendant's wrapper and label constitute a wrongful imitation of those of plaintiff, although defendant may have replaced the symbol or "trade-mark" with a clearly different device: *Enoch Morgan's Sons' Co. v. Schwachofer*, 5 Abb. N. C., 265, 55 How. Pr., 37; *Talcott v. Moore*, 6 Hun, 106; *Coats v. Holbrook*, 2 Sandf. Chy., 587; *Osgood v. Allen*, 1 Holmes, 185; *Amoskeag, etc., v. Garner*, 54 How. Pr., 297; *McLean v. Fleming*, 96 U. S. R., 245; *Colman v. Crump*, 70 N. Y., 578; *Dunbar v. Glen*, 42 Wisc., 118; *Wolfe v. Hart*, 4 Vict. L. R., Eq., 125; *Chiun v. Thomas*, 5 Victorian L. R., Eq., 188.

The numerical symbol $\frac{1}{2}$, printed in large, bold, red characters, in a certain form and style, had been used since 1873 by the complainant as one of his trade-marks on the packages and boxes of certain classes of cigarettes manufactured by him, and was registered in the United States patent office in June, 1875. This symbol was originally employed to indicate the idea that the cigarettes were composed of two kinds of tobacco, in the proportion of half and half; but except so far as it indicates this idea, which it

does not really express, it is a merely arbitrary device.

On a bill brought to enjoin against another's use of this symbol; held, that the complainant had not a right to the exclusive use of the numerical character 4, written in any ordinary manner; but that he had a right to the exclusive use of it in the particular form, size, color, and style in which he had used and registered it: *Kinney v. Allen*, 1 Hughes, 106.

Where a man has given his own name to a particular manufacture, and sells the use of his name in the manufacture of those particular goods, a court of equity will restrain him from advertising goods of the same quality under his own name, though actually made by him.

Where one named "Oakes" sold the exclusive right to manufacture and sell "Oakes' Candies," he was restrained from manufacturing and selling candies made by him as "Oakes Candies:" *Probasco v. Bonyou*, 1 Mo. App., 241.

On the dissolution of a partnership which owned a trade-mark, defendants sold their interest in the real and personal property to plaintiff, nothing being said at the time about the good-will or the trade-mark being contained in the bill of sale, and no agreement that defendant would not engage in the same business: Held, that an action would not lie to restrain defendants from using the trade-mark; that it did not pass as an incident to what was sold, and was no necessary part thereof, and that either of the late partners could use it until he divested himself of the right: *Hurver v. Dannenhoffer*, 11 N. Y. Weekly Dig., 79, Court of Appeals.

Courts of equity refuse to interfere in behalf of persons who claim property in a trade-mark acquired by advertising their wares under representations that are false: *Seabury v. Grosvenor*, 53 How. Pr., 192, U. S. Circuit Ct., Southern Dist. N. Y.

[9 Chancery Division, 568.]

M.R., July 4, 1878.

*TALBOT V. FRERE.

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[1871 T. 83.]

Mortgagor and Mortgagee—Executor—Simple Contract Debt—Retainer—Preference—Rights of Specialty Creditors.

Where a mortgagor dies insolvent, and the mortgagee then realizes his security, and, after paying himself the mortgage debt out of the proceeds, has a surplus in his hands, he cannot retain that surplus in payment of a simple contract debt due to him from the mortgagor and so give himself a preference over the other creditors, but must hand it over to the mortgagor's legal personal representative as part of his estate; the mortgagee being merely in the position of a trustee of the surplus for the estate.

And if the mortgagee in such a case happens to be the executor of the mortgagor, still he cannot, under an executor's general right of retainer or preference, retain the surplus in payment of the simple contract debt, to the prejudice of a creditor of a higher degree, whether the debt is due to himself individually or to a partnership of which he happens to be a member.

A., having mortgaged certain life policies to B. & C., a firm of solicitors, to secure a bill of costs, died insolvent. B. & C. then received the policy moneys, and, after paying themselves their mortgage debt thereof, had a surplus remaining in their hands. A.'s widow and executrix then filed a bill against B. & C. for accounts and payment of the surplus, and a decree was made directing the usual mortgagor and mortgagee accounts against B. & C., under which a balance was found due from them as mortgagees. After the decree A.'s executrix died, having appointed B. her executor, and the action was revived against B. & C., by substituting a judgment creditor of A. as plaintiff:

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A summons by B. & C. to be allowed to retain the balance in payment of a simple contract debt due to them from A., was refused, with costs.

The principle of retainer or preference in the case of a mortgagee or executor discussed.

Spalding v. Thompson (1), *In re Haselfoot's Estate* (2), and *Ex parte National Bank* (3), not followed.

ADJOURNED SUMMONS. By an indenture dated the 27th of July, 1868, Captain Talbot assigned (amongst other property) certain policies of assurance on his life to his solicitors, Messrs. Frere & Forster, by way of mortgage (but subject to certain prior mortgages) for securing a sum of £2,000 due from him to the firm for costs and otherwise, 569] with the *usual proviso for redemption on payment by the mortgagor of the amount so secured, with interest.

In August, 1869, Captain Talbot died, having by his will given all his property to his widow, and appointed her his sole executrix.

Messrs. Frere & Forster eventually received the moneys which upon the testator's death became payable upon the policies, together with other moneys forming part of the above-mentioned mortgage security, and out of these moneys paid off all the mortgages, including their own, after which a considerable balance remained in their hands.

The testator was at his death indebted to a great number of creditors, both on special and simple contract, whose claims his estate was wholly insufficient to satisfy, and accordingly in 1871 the bill in this action was filed by his widow against Messrs. Frere & Forster at the instance of one Keay, a judgment creditor of the testator, for accounts against the defendants as mortgagees and for payment of the balance remaining in their hands as such mortgagees, which balance Messrs. Frere and Forster claimed to retain on the ground that a sum of money exceeding the amount of such balance remained due to them from the testator's estate.

In 1872 a decree was made in the action directing accounts of all dealings and transactions, generally, between the defendants, and the testator and his legal personal representative, and declaring that the mortgage of the 27th of July, 1868, should stand as a security only for what should be found due to the defendants on taking such accounts.

In 1874 the plaintiff, Mrs. Talbot, died, having by her will appointed the defendant Frere her executor, and he was now her sole legal personal representative.

On Mrs. Talbot's death Keay was substituted as plaintiff in the action by order of revivor.

(1) 26 Beav., 637.

(2) Law Rep., 13 Eq., 327.

(3) Law Rep., 14 Eq., 507.

Subsequently, in taking the accounts under the decree, the Chief Clerk was directed by the judge to limit them to transactions between the testator, Captain Talbot, and the defendants, as mortgagor and mortgagees—all accounts of moneys claimed to be due to the defendants beyond the amount of their mortgage debt being thus excluded—and ultimately a balance of £1,882 4s. 2d. was found due from the defendants on that footing; but out of this *bal- [570] ance the defendants, and, in particular, Mr. Frere, as executor of Mrs. Talbot, the executrix of the testator, claimed to be entitled to retain the items so excluded from the accounts, and which items consisted of certain sums of money alleged to be due on simple contract from the testator or his estate in respect of payments or advances made by both defendants to or on account of his widow as his legal personal representative.

This summons was accordingly taken out by the defendants to obtain a declaration that they were entitled to retain the amount of the alleged simple contract debts out of the £1,882 4s. 2d., and to have all necessary accounts taken for that purpose.

Chitty, Q.C., and *H. A. Giffard*, for the defendants: This summons is based on the right, first, of Mr. Frere alone, as executor of Captain Talbot, and, secondly, of Messrs. Frere & Forster as Captain Talbot's mortgagees, to retain out of the balance found due by the Chief Clerk the amount alleged to be due to us from Captain Talbot on simple contract.

We admit there is, at first sight, a difficulty in maintaining our right as creditors on simple contract against the present plaintiff's right as a judgment creditor; but it should be remembered that this was originally a suit by the mortgagor's legal personal representative, who could not herself have claimed to be a creditor of a higher degree than ourselves, and that the decree was a decree made for the benefit of the mortgagor or his legal personal representative. That decree still continues, and is not altered in any way by the mere fact that a person happening to be a judgment creditor of the mortgagor has the conduct of the proceedings.

Treating, then, this as a suit for the benefit of the mortgagor or his legal personal representative, who is now Mr. Frere, we rely on the ordinary right of retainer—as distinguished from set-off—to which an executor is entitled in respect of a debt due to him from his testator.

[JESSEL, M.R.: The principle is, and always has been, one of preference, not of retainer. As the law formerly stood as regards executors—and it is the same still—an executor had a right to prefer one creditor to another as 571] amongst creditors of equal *degree. He could not prefer a creditor lower in rank to a creditor higher. It followed, therefore, that if he was a creditor he had a right to prefer himself to another creditor of equal degree; and this was called “retainer” because he had the money in his own hands; but it was, in reality, the exercise of the right of preference in his own favor, and the proof that that was so was that he had no right of retainer against a creditor of a higher degree.]

Then, upon the second point, if the plaintiff comes into equity as representing the testator's estate, he must do equity: and the equity here is that the mortgagees of the testator having a balance in their hands, the representative of the testator must do what the testator himself would have done, that is, allow them to retain out of that balance a debt due to them over and above the mortgage debt; for we, being mortgagees and having possession of this money, cannot, we submit, be called upon to give it up without payment of our simple contract debt. That such an equity exists, and that a mortgagee has such a right of retainer as we now claim, was decided by Lord Romilly in *In re Haselfoot's Estate* (¹), which is on all fours with this case, and in which his Lordship followed his previous decision in *Spalding v. Thompson* (²). Moreover, both those decisions have been recognized as law and followed by Vice-Chancellor Malins in *Ex parte National Bank* (³), where his Lordship says (⁴), “If A. creates a mortgage in favor of B., and the mortgage being realized, he has the balance in his hands, natural justice would seem to point out that he would be entitled to retain the surplus and apply it in payment of a general debt due to him.”

[JESSEL, M.R.: I must confess I cannot see upon what principle those cases were decided. I should have thought equity and natural justice were exactly the other way. There can be no natural justice in allowing one creditor of a testator, simply because he happens to have a mortgage, to retain the balance in favor of himself to the prejudice of the other creditors, thus virtually giving himself another mortgage. If a man has a mortgage on a dead man's property, and he realizes the property and pays off the mortgage debt

(¹) Law Rep., 18 Eq., 327.

(²) 26 Beav., 637.

(³) Law Rep., 14 Eq., 507.

(⁴) Ibid, 516.

and has a surplus, surely, according to *natural justice, the surplus ought to belong to the dead man's estate, to be divided among the creditors. He is only a bare trustee of the surplus. It seems to me that the correct view of the law is stated by Mr. Hemming in his argument in *In re Haselfoot's Estate* (*).]

It is laid down in *Fisher on Mortgages* (*), that simple contract debts due from the mortgagor may be tacked against him, so as to avoid the circuity of action which would result from the mortgagee creditor being driven to enforce his claim as creditor by a separate action.

No doubt, if this were the case of a creditor suing and seeking to have a charge on the assets of an insolvent estate, a simple contract creditor could not, as against the creditor so suing, maintain a right to tack or retain; but this is not a suit of that character.

Davey, Q.C., and *Jolliffe*, for the plaintiff, were not called upon.

[JESSEL, M.R., mentioned *Rolfe v. Chester* (*) and *Irby v. Irby* (*).]

JESSEL, M.R.: The testator in this case being entitled to policies of assurance on his life, mortgages them to certain persons in the usual way. After the mortgagor's death his executrix files a bill for an account, the mortgagees having received the policy moneys from the offices. As I understand the matter, if in such a case there is more than sufficient to pay—as there is here—the principal of the mortgage debt with interest and costs, the mortgagee is a bare trustee of the balance for the executor of the mortgagor, that is, for the mortgagor's estate.

But the mortgagees say, "We are simple contract creditors of the testator. We claim to keep the balance, or—if the balance exceeds the debt—a sufficient part of the balance in payment of our simple contract debt." That would be perfectly intelligible if the estate were solvent, as it would avoid circuity of action; but the executor says and proves that the estate is heavily insolvent; it is not even sufficient to pay the specialty creditors who, as the *law stood [573 at the date of this testator's decease, were entitled to a preference: and the executor says therefore to the mortgagees, "This is not avoiding circuity of action, but is an attempt on your part as simple contract creditors to gain a preference over creditors of superior degree; but even if there were no creditors of superior degree, and there were—as there are—

(*) Law Rep., 13 Eq., 327.

(*) 3d ed., pp. 617, 619.

(*) 20 Beav., 610.

(*) 22 Beav., 217.

a great many creditors of equal degree, it is also an attempt to take a preference as regards that degree; therefore I say it is not circuity of action at all, but an attempt on your part to get a preference over the other creditors.'

There is no law, so far as I am aware, which entitles a person who is a bare trustee for the testator or for the testator's estate, to acquire by reason of his position as trustee, any charge or lien on the trust money in respect of a simple contract debt.

I asked the mortgagees' counsel, not unnaturally, on what principle such a doctrine could be founded. One ground they said was circuity of action. That I have disposed of. Secondly, it was said there is a doctrine of possession. According to our law, it is alleged, whoever gets possession of property may keep it if he can, and he has a right to keep it if he has any claim whatever against its owner. No doubt there is sometimes a general lien either by custom of trade, or otherwise, which entitles a creditor to keep the property deposited with him even for safe custody—to keep it until he is paid. That is a general lien given by law in the nature of a mortgage: instead of being special security it is a general security. There is not a pretence for anything of the sort here. What right has the mortgagee to keep the property? None that I know of, because even the right of set-off as at present subsisting is the creation of statute (1) by which, when a man owed money to A., and was also the creditor of A., he was entitled to set-off, but there could not be a set-off until action brought and set-off pleaded. In this case the mortgagee cannot plead set-off. He is a trustee of money for the estate, and his claim is only a simple contract debt against that estate.

As I said before, the plaintiff is a specialty creditor and the mortgagees are simple contract creditors; their rights, therefore, are not rights of equal degree.

574] *Then a third ground was put, that he who comes into equity must do equity. I entirely agree with that. The question is, what is the equity? Assuming that there were no specialty creditors in the case, but that they were all simple contract creditors—all creditors of equal degree—the equity is to divide the assets equitably among them; and that is what the plaintiff, as representing the testator's estate, says he wants to do. It appears to me he is willing to do equity, but that the trustees are not willing to do equity. They want to get a preference in the distribution

(1) 2 Geo. 2, c. 22, s. 18, and 3 Geo. 2, c. 24, ss. 4, 5.

of the assets. Therefore there does not appear any substantial argument on the third ground.

Then, the argument being exhausted—or for lack of argument—recourse is had to authority, and three cases have been cited. All I can say is, I do not understand them. It is no use my commenting on them, I cannot make out any principle on which they were decided, and I confess I do not understand them. As I have often said, I cannot follow an authority unless I understand its principle. If a case lays down a principle it is a guide to other judges, but a mere decision where you cannot find out the principle is of no use at all. The only use in citing an authority is as an illustration of some principle or rule of law, but where none is to be found and none to be extracted from the case cited, it is utterly useless for the purpose of a judge, however desirous he may be of following it.

The law had been perfectly well settled on all these points many, many years before those cases were thought or heard of, and I do not think the judges who decided those cases intended to do more than to follow the rule of law already laid down: they did not intend to lay down new law.

That being so it appears to me that the notion of the trustee having either a lien, or mortgage, or charge, or right of preference is wholly unfounded. No such right ever existed.

Reference has been made to the right of retainer by an executor. There is a right given by law to the executor, whether as a reward for his gratuitous exertions in winding up the estate or not, I do not know, but the Legislature has not thought fit to interfere with it, and that right is a positive preference given to him over all creditors of equal degree, and his retainer is a mere *exercise of the preference, when you examine it, in his own favor. Of course, if the mere fact of a man being in possession gave him that preference, there would be some ground for the defendants' contention; but, as I put it in the course of the argument, I do not know that a preference is given to a creditor merely because he is in possession of assets. It could not be alleged, if the testator lent his creditor a horse, that the creditor could, after the testator's death, keep the horse until the debt was paid; or, if the testator put bonds which are payable to bearer in his creditor's hands for safe custody only, the creditor not being a banker or a person by law having a right of general lien, that he could keep the bonds because he was a creditor. The same principle would ap-

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ply whether it was a bag of sovereigns, or a bond payable to bearer, or a horse: there is no distinction.

That being so, this claim fails. I think it fails on another ground. The debt is a debt due, not to Mr. Frere, the executor, individually, but to himself and Mr. Forster on joint account; and this is an attempt to carry the notion of preference beyond the right of the executor alone to the right of a firm in which the executor happens to be a partner, on the ground of the executor's right of preference as applied to a firm of which the executor is a partner. But the reason for such a right of preference is clear. It is a legal preference. The executor cannot sue himself, and he cannot prove against himself in any other way except by retainer. Now, he can retain on behalf of himself and partners, and that is the mere exercise of the right of preference at law, all partners suing together as one man. That is the explanation of the right of the executor to pay the joint debt of the partnership of which he is one of the partners. But that principle has no relation whatever to a person who by law has no preference. You cannot apply the doctrine of preference in the case of partnership where it does not apply to individuals; and, as I said before, this is quite a fatal objection, independently of the other one.

The summons is therefore refused, with costs.

Solicitors for plaintiff: *Bower & Cotton.*

Solicitors for defendants: *Frere, Forster & Frere.*

[9 Chancery Division, 576.]

M.R., July 14, 1878.

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*In re BIRKETT.

Will—Charitable Bequest—Object partly illegal—Repair of Tomb—Whole Fund given to valid Charity—Costs—Executor—Trustee Relief Act—Proceeding by Summons instead of by Payment into Court.

Bequest to the incumbent for the time being of U. of £500, the income to be applied, when necessary, in keeping in repair the grave and the railing and tombstone of A., and the remainder of such income to be applied in providing wine and bread for the sick poor of U., with a gift of the residue to the executor in trust for B. The executor paid the legacy into court under the Trustee Relief Act. On petition by the incumbent:

Held, that the first purpose of the gift being invalid, the whole of the income was applicable to the charity; and that the sum should be paid to the official charity trustee to invest and pay the income to the incumbent of U. for the time being to be applied by him for the sick poor of the parish, as in the will directed: the executor's costs not to be allowed out of the fund, though he might take it out of the residue.

The cases of *Chapman v. Brown* ⁽¹⁾, *Magistrates of Dundee v. Morris* ⁽²⁾, and *Fisk v. Attorney-General* ⁽³⁾, commented on.

Semble, under the present practice, when it is doubtful to whom a legacy is payable, the better course is not by payment into court under the Trustee Relief Act, but by an administration summons, waiving accounts, simply for the purpose of obtaining the decision of the judge, or, after taking out such summons, where both parties agree, by submitting a statement of facts in the nature of a special case for the opinion of the judge.

If the executor does pay it in he will be left to take his costs out of the residuary estate, and will not have them out of the legacy.

PETITION. Margaret Birkett, who died in 1876, by her will, dated the 15th of March, 1872, gave the following bequest: "To the incumbent for the time being of Unsworth the sum of £500, the income to be applied when necessary in keeping in good repair the grave and the railing and tombstone of my late father, and the remainder of such income to be applied by such incumbent for the time being in providing wine and bread for the sick poor of Unsworth." The testatrix gave her residuary estate to her executor, William Rawlinson, in trust for Thomas Butterworth on his attaining the age of twenty-one.

*The legacy of £500 was paid into court under the [577 Trustee Relief Act by the trustee and executor, and the Rev. B. Compton, the incumbent of Unsworth, now presented his petition for payment of the whole fund to himself to be applied for the benefit of the poor of the parish.

Oswald, for the petitioner: The gift of a portion of the income for keeping in repair the grave, the railing, and the tombstone of the father of the testatrix, being void, there can be no apportionment of the fund between the residuary legatees and the charity, but the whole fund is applicable to the charitable purposes mentioned in the will: *Fisk v. Attorney-General* ⁽⁴⁾; *Dawson v. Small* ⁽⁵⁾; *In re Williams* ⁽⁶⁾. The petitioner, therefore, is entitled to the whole fund to be applied by him as in the will directed.

Davey, Q.C., and *Warmington*, for the residuary legatee of the testatrix, and also for the trustee and executor: The whole of the gift is void; or if it be held that the charitable gift of the surplus is good, we contend that the gift of so much as will produce the income necessary to keep the tombstone in repair, which is an ascertainable amount, as in the case of the *Magistrates of Dundee v. Morris* ⁽⁷⁾, is void. In *Fisk v. Attorney-General*, Vice-Chancellor Wood seems to have misapprehended the *Magistrates of Dundee v. Morris*, and to have considered that it overruled a de-

⁽¹⁾ 6 Ves., 404.

⁽²⁾ 3 Macq., 134.

⁽³⁾ Law Rep., 4 Eq., 521.

⁽⁴⁾ Law Rep., 18 Eq., 114; 9 Eng. R., 685.

⁽⁵⁾ 5 Ch. D., 735; 22 Eng. R., 437.

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cision of Sir William Grant in *Chapman v. Brown* ⁽¹⁾; but that is not so, for in *Chapman v. Brown* it was impossible to ascertain the amount required for the purpose named by the testator, namely, for the building of a chapel. The principle of the earlier cases of *Chapman v. Brown* and *Magistrates of Dundee v. Morris* is applicable to the present case, and though there are later decisions where a different view has been taken, they are capable of explanation.

We submit, therefore, that the residuary legatee is entitled, at any rate, to so much of the fund as would be [578] required to produce *the income necessary to keep in repair the grave, the railing, and the tombstone mentioned in the will, supposing that purpose had been valid. If the gift of the surplus for the charitable object takes effect, the amount should, we submit, be paid, not into the hands of the petitioner, but to the official charity trustee to invest and pay the income to the incumbent of Unsworth for the time being, to be applied by him for the poor of the parish, according to the directions in the will.

JESSEL, M.R.: This case is a singular illustration of the way in which our law gets altered.

The question I have to decide is, whether this bequest is valid or not valid, as regards the whole of the income of a sum of £500, or as regards part of it.

Now I have no hesitation in saying that, if there were no authorities, I should feel very little difficulty in deciding quite in a different way from that in which I am about to decide. If there were no authorities, I should hold, where there is a gift of money upon trust to apply a portion of the income for a definite purpose, and then to apply the surplus for another purpose, that, if the first purpose were sufficiently defined to enable you to ascertain the amount of the income that would be required for it, and that purpose failed through the gift being invalid, the gift of the surplus would be unaffected beyond the amount so ascertained.

If, for instance, a man were to give an income of £10,000 a year in trust in the first place to keep his father's tombstone in repair, which under no conceivable estimate could exceed £20 a year, and directed the residue of the £10,000 a year to go to charity, I should assume that good law, which always means common sense, and common sense would concur in saying that the £20 gift was void, and that the £9,980 was well given to charity. I should have felt no

(1) 6 Ves., 404.

difficulty whatever in saying that was the law. I think, considering what the House of Lords did in the Scotch case which has been referred to—*Magistrates of Dundee v. Morris* (¹)—where they appear to have held that a gift of a sum of money to found a hospital, which was in fact a school for 100 *boys, was sufficiently definite, inasmuch as [579 the amount required for the hospital could be ascertained, that you might say, in like manner, that the amount required for the repair of a tombstone is always sufficiently definite, especially where it is an existing tombstone, the average amount required for the repair of which might be ascertained by any competent person. It appears to me, therefore, in principle you would ascertain the amount required for the tombstone, and devote the rest to the purpose of charity.

I quite agree to this, that if the first object is not so defined that you can reasonably ascertain the amount required, the whole must fail, because you might then apply the whole of the gift to the first object; and therefore, if you could apply the whole of the income properly and fairly to the first object, there would, of course, be no ascertainable residue. And that appears to me to have been the case of *Chapman v. Brown* (²), which I must say, with the greatest possible deference to three or four judges, does not appear to me to be overruled by the case of *Magistrates of Dundee v. Morris* (¹). In that case the House of Lords thought there was sufficient limitation pointed out by the will as to the charitable object to enable them to ascertain the amount required to be applied for carrying out that object. But in *Chapman v. Brown*, Sir William Grant was of opinion that there was not enough to enable him to decide; and I must say, if it were not improper for me to express an opinion as between Vice-Chancellor Wood and Sir William Grant, that in my opinion Sir William Grant was clearly right, namely, that there was not enough.

The purpose in the case of *Chapman v. Brown* was this. The testatrix gave the residue of her estate to executors “for the purpose of building or purchasing a chapel for the service of Almighty God.” Now, could any human being say what would be reasonable for the purpose of building such a chapel? You might have any kind of a chapel; you might have something very much like a barn, a kind of structure with which we are but too familiar in this country, or you might have a beautiful chapel resembling,

(¹) 3 Macq., 134.

(²) Ves., 404.

for instance, La Sainte Chapelle in Paris, or the Sistine chapel at Rome. I mean to say there is no possible limitation, so that there was nothing at all to guide the court, 580] that I can find, in the case *of *Chapman v. Brown* ('); and there was nothing to prevent the whole of the residue from being applied to the building of the chapel. The executors had a discretion. The testatrix said that there might be an overplus, and if there was, they might devote it to something else, but from the nature of the gift the whole of the residue might well have been applied to building the chapel. It does not appear that there was more than sufficient, if the whole of the residue were so applied, to build a decent chapel. It appears to me, therefore, that there is nothing in the authority of *Magistrates of Dundee v. Morris* (') which at all interferes with *Chapman v. Brown*, the principle being, as I have said, that if you cannot fairly ascertain what is the extreme sum required for the first purpose, so that you may properly apply the whole property given to the first purpose, then of course, if the first purpose is void, the contingent surplus cannot be ascertained, and the whole gift fails.

That being my opinion as to the case if it were untrammelled by any authorities, what do I find as regards authority? It is of the utmost importance, as regards our law, that judges of the first instance should not disregard a series of decisions by other judges of first instance, none of which have been appealed or have been otherwise interfered with. In the case of *Fisk v. Attorney-General* ('), in 1867, where there was a gift to an incumbent of a sum of stock upon trust out of the dividends to apply such part thereof as should be required to keep in repair a family grave, and to apply the surplus for charity, Vice-Chancellor Wood decided that, although the gift for the grave failed, yet the gift of the corpus was not affected, and the whole of the income was applicable to the charity. It may be difficult on principle to discover how he arrived at that conclusion, but he did arrive at it. The gift here in question is, to my mind, wholly undistinguishable from the gift there. I cannot find any possibility of fairly distinguishing it. That decision of the Vice-Chancellor was followed twice by Vice-Chancellor Bacon—once in the case of *Hunter v. Bullock* ('), in which he considered it settled law, and again in the case of *Dawson v. Small* ('). It was also followed by Vice-Chan-

(') 6 Ves., 404.

(*) 8 Macq., 134.

(*) Law Rep., 4 Eq., 521.

(*) Law Rep., 14 Eq., 45.

(*) Law Rep., 18 Eq., 114; 9 Eng. R. 685.

cellor *Malins, in the case of *In re Williams* (¹), so [581 recently as the 2d of June, 1877. Consequently we have four decisions, the oldest ten years old, all in point, by three judges of co-ordinate jurisdiction. With these authorities before me, and sitting here as a judge of first instance, I shall simply follow them, and decide the case in the same way.

The result will therefore be that the whole of the income will be applicable to the charitable purpose. The respondents have very properly suggested that the fund should be paid over to the official charity trustee, and the income only given to the incumbent of Unsworth for the time being, to be applied by him for the charitable purpose named in the will; and that is the order I shall make.

Davey asked for the executor's costs.

JESSEL, M.R.: The petitioner's costs must come out of the fund, but I cannot give the trustee any costs. He can take them out of the residue, but an executor trustee cannot, by paying a legacy into court, relieve the residue from its proper burden. When there is a difficulty in determining how a legacy is to be applied, he should reserve some part of the residuary estate to pay the costs; but there is no justification, under the present practice, for an executor paying the legacy into court, and so throwing part of the costs upon the legacy. This course of proceeding is not so cheap under the present practice as an administration summons, waiving the accounts, which can be simply adjourned into court without any affidavit or petition.

There is also another course which is cheaper than payment into court, and that is, to take out an administration summons, and for both parties to agree upon a statement of facts in the nature of a special case for the decision of the judge, and then, if the parties wish, it can be adjourned into court.

Solicitors: *Johnson & Weatherall; G. B. Wheeler.*

(¹) 5 Ch. D., 735; 22 Eng. R., 437.

[9 Chancery Division, 582.]

M.R., July 28, 1878.

582] *MORGAN V. SWANSEA URBAN SANITARY
AUTHORITY.

[1878 M. 66.]

Vendor and Purchaser—*Land Transfer Act, 1875 (38 & 39 Vict. c. 87), s. 48*—"Bare Trustee"—*Unpaid Vendor*.

A trustee with a beneficial interest in the trust estate is not a "bare trustee" within the Land Transfer Act, 1875, s. 48.

Thus a vendor of freeholds who let the purchaser into possession before payment of the purchase-money and execution of the conveyance was, by reason of his having a lien on the property for his purchase-money and not being bound to convey until payment, held not to be a "bare trustee" within the act, so that upon his death, the money still remaining unpaid and the conveyance unexecuted, the legal estate passed to his heir-at-law.

Quare, Whether a trustee without a beneficial interest in the trust estate, but having active duties to perform in relation thereto, is a "bare trustee" within the act.

Christie v. Ovington (1) considered.

IN the year 1875 Isaac Morgan, being seised in fee of certain lands, contracted to sell them to Swansea Urban Sanitary Authority for £200, and shortly afterwards the Sanitary Authority, in contemplation of their intended purchase and with Morgan's assent, entered into possession of the lands and had ever since remained in possession thereof.

The conveyance was engrossed, but was never executed by Morgan, who died suddenly and intestate in July, 1876. The plaintiff, who was his widow and legal personal representative, called upon the Sanitary Authority to accept from her, as such representative, a conveyance of the property on the ground that inasmuch as at Morgan's death nothing remained to be performed on his part except to execute the conveyance and receive the purchase-money, he was at his death a "bare trustee" of the property within the meaning of sect. 48 of the Land Transfer Act, 1875.

The Sanitary Authority did not dispute the validity of the contract, but insisted that Morgan was not at the time of his death a "bare trustee" within the meaning of the 583] act, and that *the legal estate in the lands in question was vested in his heir-at-law; and the heir being an infant, they declined to complete their purchase until the contract was established by decree against him.

The plaintiff then brought this action against the Sanitary

(1) 1 Ch. D., 279.

Authority, claiming specific performance of the contract, and that it might be declared in whom the legal estate was vested, and who were the proper persons to convey.

The infant heir-at-law was made a co-defendant.

H. Fellows, for the plaintiff: The vendor was undoubtedly a trustee for the purchaser: *Shaw v. Foster* ('); *Lysaght v. Edwards* ('); the question is whether he was a "bare trustee" within sect. 48 of the Land Transfer Act, 1875. The vendor was not in possession at his death, nor had he any active duties to perform. A vendor in possession is, I admit, not a bare trustee, for he has duties to perform; as, for instance, he has to keep the property let, *Earl of Egmont v. Smith* ('); but here he had nothing to do but to execute a deed. In *Christie v. Ovington* (') Vice-Chancellor Hall has expressed his approval of the doctrine laid down in *Dart's Vendors and Purchasers* (') to this extent, that a person to whose fiduciary office no duties were originally attached, or who, although such duties were originally attached to his office, would, on the requisition of his *cestuis que trust*, be compellable in equity to convey the estate to them, or by their direction, is a bare trustee within the section. Here the vendor was not the less a bare trustee because he had certain rights by reason of his having a lien for his purchase-money. If he had received his purchase-money he would unquestionably have been a bare trustee, and the mere fact of his having a lien for his unpaid purchase-money was not, I submit, sufficient to take him out of the section.

Davey, Q.C., and *Brynmôr Jones*, for the defendants, the Sanitary Authority, and *Badcock*, for the heir-at-law, were not called upon.

*JESSEL, M.R.: I am sorry to see that there is a [584 difficulty on the construction of this act of Parliament, and a difficulty so great that persons of great knowledge and learning, who have paid particular attention to the subject, entertain some doubt as to its meaning. I find that, the point having been brought before the Vice-Chancellor Hall, he was referred to what Messrs. Dart and Barber say in their valuable book on *Vendors and Purchasers* ('), and they express their view in this way: "The act does not define what is meant by a 'bare trustee' in this and the preceding section; and the term is generally considered to be ambiguous; but it will probably be held to mean a trustee to whose office no

(') Law Rep., 5 Ch., 604; Law Rep.,

5 H. L., 821; 2 Eng. R., 1.

(') 2 Ch. D., 499, 506; 17 Eng. R., 594.

(') 6 Ch. D., 469; 23 Eng. R., 92.

(') 1 Ch. D., 279.

(') 5th ed., p. 517.

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duties were originally attached, or who, although such duties were originally attached to his office, would, on the requisition of his *cestuis que trust*, be compellable in equity to convey the estate to them, or by their direction, and has been requested by them so to convey it."

Now these gentlemen occupy a position in the profession which entitles their opinion to be treated with great respect, even by a judge, but I must say I am quite unable to follow it. First of all, what is the meaning of "a trustee to whose office no duties were originally attached?" I cannot imagine a trustee who has no duties. He must be a trustee for somebody. The very notion of a trustee is that there are some duties attached to the office. I suppose it means "active duties," in the sense of trusts to sell, or lease, or something of that sort. I must assume it does mean that, because the writers go on—"or who, although such duties were originally attached to his office, would, on the requisition of his *cestuis que trust*, be compellable in equity to convey the estate to them, or by their direction, and has been requested by them so to convey it."

Here, again, I have great difficulty in following the writers' meaning. If *cestuis que trust* are competent to request, and all request, every trustee must concur. There may be cases, of course, where some of the *cestuis que trust* are under disability, but I should have thought it was the universal rule that where *cestuis que trust* all agree, and are, of course, all competent to request, then on their requisition a trustee must convey. Therefore, one *does not quite understand the definition. I think it must mean where there are *cestuis que trust* all competent, and therefore entitled to call for a conveyance.

But here, again, I feel great difficulty. Where there are *cestuis que trust* all competent, and who together are entitled to call for a conveyance, even then it does not throw much light on the meaning of the words "bare trustee," because the bare trustee in that case might have active duties to perform.

Then I have got the opinion of the Vice-Chancellor Hall in *Christie v. Ovington* (¹), where, after reading the passage I have quoted from Messrs. Dart and Barber's work, he says: "In my opinion the words 'has been requested by them so to convey it,' are not an important or a necessary ingredient to a person being a bare trustee." It seems to me that unless you have those words you can make no meaning of the expression "bare trustee" at all, because if

(¹) 1 Ch. D., 281.

the tenant for life or the remainderman has not requested, how can the trustee be called a "bare trustee"? What the writers mean must, I think, be this: Where a trustee has active duties to perform, and the *cestuis que trust* are more than one and have not requested, then he is not a bare trustee; but if they are all competent and have requested, then he is, because he has then kept the estate, so to speak, by wrong; that is, upon request he ought to have conveyed, and he is thus a "bare trustee." The learned Vice-Chancellor then concludes by saying, "Leaving out these words, I approve of the statement which I have read from their valuable work." If you leave out those words, I am utterly at a loss to make out any meaning of it at all. However, both the Vice-Chancellor and the writers I have mentioned agree that a person with active duties is not a "bare trustee" under the act of Parliament.

I am sorry to say that, unaided by that assistance, I should have come to a different conclusion. I should have thought that a "bare trustee," or a "naked trustee," meant a trustee without any beneficial interest. We have this analogy at all events, that under the Bankruptcy Act, where a trustee has no beneficial interest, the legal estate does not pass; but where he has, it does pass. Besides that, I am utterly at a loss to treat a trustee who *has [586 a beneficial interest as a trustee and nothing more. The word "bare," or "naked," shows that he is nothing more than a trustee. Whether or not persons who are nothing more than trustees with active duties to perform are to be called "bare trustees," I do not say; but it appears to me clear that trustees who have a beneficial interest are not "naked" or "bare" trustees. It is not absolutely necessary for me to decide that other question, namely, whether a trustee who has active duties to perform is a bare trustee; but I do decide that a trustee who has a beneficial interest is not a "bare" or "naked" trustee under the act of Parliament.

Now the present case is that of an unpaid vendor. He is not bound to convey until he is paid the purchase-money. He has a charge or lien on the estate for the purchase-money. All I can say is, according to my notion of the use of language, a man in that position could not be properly described as a "bare trustee." In one sense, no doubt, he has ceased to be the owner of the estate and is only trustee. In that sense he is liable to convey when he is paid the purchase-money, but it does appear to me that he is not a "bare trustee."

I expressly abstain from giving an opinion, until I am absolutely compelled, as to whether or not a trustee without a beneficial interest, but who has active duties to perform, is or is not a "bare trustee" under the act of Parliament.

The result is, I hold that the vendor was not a "bare trustee" within the act. The plaintiff is, therefore, entitled to a judgment for specific performance, and there will be a declaration that the heir-at-law is trustee, followed by the usual vesting order.

Solicitors: *Crowder, Anstie & Vizard; Johnson & Weatherall.*

The plaintiff, as the administrator with the will annexed of one Adaline Brooks, deceased, brought this action to compel the specific performance of a contract made by the deceased in her lifetime, for the sale of certain land owned by her, to certain of the defendants herein. The vendees had made all the payments that could be required, except that which was to be made on the delivery of the deed, which the heirs refused to execute. The heirs and the vendees were all made defendants to this action:

Held, that the action could be maintained, and that, as the heirs refused to execute a deed, the plaintiff was not obliged to tender one to the vendees before the commencement thereof: *Wheeler v. Crosby*, 20 Hun, 140.

Lands subject to mortgage were devised "after payment of debts" to the widow for life, remainder to the plaintiff, who accepted from the widow a lease for her life of the premises. The widow having refused to pay the interest accruing on the mortgage, the plaintiff paid the same and also the principal money thereon:

Held, that these facts did not entitle

the plaintiff to call upon the widow for payment out of the rents reserved by the lease or out of the personal estate bequeathed to her; the only relief to which he was entitled being to have the mortgage debt, together with the interest on the sum secured until it became due, raised out of the land: *Burk v. Burk*, 26 Grant's Ch., 195.

Where the vendor of two quarters of land, upon an accounting of the sum due and increase of past interest, made a deed to his vendee for both tracts, taking back a mortgage upon one of the tracts sold and a different piece of land, and on the same date the purchaser conveyed the quarter not included in the mortgage, to another, who executed to the original vendor a writing giving a lien on his tract in case the purchase-money was not made under the mortgage, it all being a part of the same transaction, the vendor, after foreclosure and sale under the mortgage, will have a clear right to recover any deficiency due him from the sale of the mortgaged land from such second purchaser: *Edwards v. Hall*, 98 Ills., 326.

[9 Chancery Division, 587.]

M.R., July 25, 1878.

*DIXON V. DIXON.

[587]

[1877 D. 287.]

Trustee—Breach of Trust—Married Woman—Trust for Separate Use—Payment of Dividends to Husband—Assent of Wife—Right to recover arrears of Dividends.

The trustee of a sum of stock for the separate use of a married woman having improperly transferred it into the joint names of her husband and himself, the husband for six years received the dividends, after which the trustee died, and the husband, without his wife's knowledge, sold out the stock, and applied the proceeds to his own use. Some time afterwards he left her:

Held, that, though the wife might have been presumed to have assented to the husband's actual receipt of the dividends while the stock remained intact, yet no such assent could be presumed after it had been sold, and that she was entitled to recover, as against her husband and the estate of the deceased trustee, the arrears of dividends which had accrued since that time, as well as to have the trust fund replaced.

UNDER the will of Maria Brett, a share of her property, amounting to £2,836 15s., was bequeathed to her surviving executor, Francis Moore, upon trust to pay the income thereof to the plaintiff Amelia Dixon during her life for her separate use, and so that her receipts alone should be sufficient discharges for the same, and after her decease upon trust for her husband, James William Dixon, for life, and after the decease of the survivor of them, upon trust for their children as therein mentioned.

After the death of the testatrix, in 1866, Francis Moore invested the said trust fund in Government Stocks, and in 1867, at the request of James William Dixon, he sold out the said stocks, and invested the proceeds in the purchase of £2,700 East Indian Railway Stock in the joint names of himself and James William Dixon, and they sent a written request to the directors of the East Indian Railway to pay the interest on the £2,700 stock to J. W. Dixon, taking his receipt as his sufficient discharge, and from that time the dividends were regularly paid to him. No formal appointment of J. W. Dixon as trustee was ever made.

On the 13th of July, 1870, Francis Moore died. In 1873, J. W. Dixon, without the knowledge of his wife, sold out the whole *of the £2,700 East Indian Railway [588 Stock and appropriated the same to his own use. Since that time no dividends or interest of the trust fund had been paid to the plaintiff Amelia Dixon, or to any person by her order, or for her use. J. W. Dixon had now left his wife,

and had ceased to maintain her, leaving her and their children without any means of support.

The present action was brought by Amelia Dixon and her children, by their next friend, against James William Dixon and the executors of Francis Moore.

The plaintiffs claimed a declaration that the defendant James William Dixon and the estate of Francis Moore were jointly and severally liable to replace and make good the original sum of stock and the dividends which would have accrued thereon if the fund had not been wrongfully invested. The claim to the arrears of dividends was limited at the bar to the arrears which had accrued since the sale of the East Indian Railway Stock in 1873. The defendant Dixon had disappeared, and the plaintiffs were unable to serve him.

The liability of the defendants to replace the trust fund was not disputed, and the only point raised in argument was as to the right of the plaintiff Amelia Dixon to recover the arrears of dividends from the time when her husband sold the East Indian Railway Stock.

Chitty, Q.C., and *C. Browne*, for the plaintiffs: The defendants the executors of Francis Moore are liable, as well as J. W. Dixon, who has absconded, to make good the amount of the trust fund, the transfer of which into the name of Dixon jointly with Moore was a breach of trust. They are also liable to pay to the plaintiff Amelia Dixon the arrears of the dividends from the time when the East Indian Railway Stock was sold without her knowledge by the husband. No assent on her part can be presumed.

Davey, Q.C., and *Pope*, for the executors of Francis Moore: The only question is as to the liability of the estate of the deceased trustee to make good to the plaintiff Amelia Dixon the arrears of the dividends from October, 1873, when the East Indian Railway Stock was sold by her [589] husband. The right of a married *woman to recover the arrears of income to which she is entitled for her separate use, and which has been paid to her husband, depends on her assent, express or implied, to the husband receiving it. There is no doubt that in this case the plaintiff's assent would be presumed so long as the husband actually received the dividends. There is nothing to show that she made any inquiry about them, or made any objection to their being paid to him, nor is there anything to show that she made any inquiry afterwards. She cannot claim as against him any arrears during the time that he was living

with her, nor can she claim them as against the representatives of the deceased trustee.

In *Caton v. Rideout* (1) it was held that, where a husband and wife had so dealt with the wife's separate income as to show that they must have agreed that it should come into the husband's hands for their joint use, it would amount to a direction on her part that he should receive it. The same principle was recognized in the case of *Payne v. Little* (2), and is applicable here. The plaintiff's assent must be presumed to the husband receiving the dividends so long as he lived with her and maintained her, notwithstanding his misappropriation of the trust fund, and the representatives of the deceased trustee cannot now be made liable to recoup them.

JESSEL, M.R.: As I understand the law, the wife is entitled to recover the arrears of her separate income. It is not like pin-money. In the case of separate estate she is entitled to recover the arrears of it, but if she consents to her husband receiving her income, and they have lived together, then she is not entitled to any account of it, either as against the trustee who may pay it to the husband, or as against the husband himself. The whole of that depends upon her consent.

In order to show this, I will refer to the argument of the Solicitor-General, afterwards Lord Cottenham, in the well-known case of *Howard v. Digby* (3). After referring to some cases upon pin-money—that being a case of pin-money—he speaks of “these cases, and all the cases on the subject of pin money or other *separate estate” (for no [590 distinction was made between them), “being decided on the ground of consent or no consent on the part of the wife.”

In the case of *Caton v. Rideout* (4), where the husband himself was one of the trustees, and Messrs. Currie, the bankers who received the dividends for the trustees, paid them, with the sanction of the wife, Mrs. Rideout, to the account of the husband at Messrs. Child's, Lord Cottenham says this (5): “A wife having property settled for her separate use is entitled to deal with the money as she pleases. If she directly authorizes the money to be paid to her husband he is entitled to receive it, and she can never recall it. No direct authority has been produced which affects the case before me. If the husband and wife, living together, have for a long time so dealt with the separate income of the wife, as to show that they must have agreed that it should

(1) 1 Mac. & G., 599.

(2) 2 Cl. & F., 684.

(3) 26 Beav., 1.

(4) 1 Mac. & G., 601.

come to the hands of the husband to be used by him (of course for their joint purposes), that would amount to evidence of a direction on her part that the separate income, which she otherwise would be entitled to, should be received by him." Then, further on he says ('): "The question then is, was the money at Messrs. Child's in the hands of the husband, as husband, or as trustee? In the first place, it ought not to have got into his single hands as trustee at all; but it ought to have been under the control of himself and the other trustee. Messrs. Currie received it for the trustees, and then, with the joint concurrence of both husband and wife, paid it to the husband's separate account with Messrs. Child, the wife knowing it, and for years permitting them so to deal with it, without any interruption on her part. It appears then to me, as the evidence stands, that this payment was made to the husband, as husband, and not as trustee."

The other case to which I was referred, was that of *Payne v. Little* (*). In that case the husband was liable to pay the trustees some interest, and out of the interest the wife was entitled to an annuity; so that in substance, although not in form, the husband was liable to pay the annuity. The wife and the husband lived together, and Lord Romilly came to the conclusion that there was no sufficient evidence [591] for him to interfere on the part of the wife. *I have nothing to do with the point whether the evidence was sufficient or not, I am dealing with the law, but that he came to the same conclusion as to the law is plain, because he says (*), "If Mr. Payne had received his wife's annuity, he would be entitled to the benefit of every fair inference, from which a contract, or an acquiescence on her part might be assumed, in case of an account being taken between them." Of course it must be contract or nothing. But by acquiescence he means consent, which in that case was equivalent to acquiescence. He adds, "I am of opinion that Mr. Little is entitled to the same benefit in any account to be taken between him and Mrs. Payne. If money has been *bona fide* and properly employed, it is wholly indifferent, in this court, whether it has gone through the proper channels and the various stages and steps to arrive at that result; if the hand which was entitled to receive the benefit has really received it, the persons who ought to have first received it and then paid it over, cannot be made liable for it. I am therefore of opinion, that to the extent of any arrears of the wife's annuity accruing, while living with her husband, she must be treated as having allowed her husband to receive and

(*) 1 Mac. & G., 608.

(*) 26 Beav., 1.

(*) 26 Beav., 3.

apply it for their common benefit, and as if their separate incomes had been, by arrangement, applied by the husband for their mutual benefit, instead of the wife's income having, in the first instance, been received by her and then handed over to her husband for that purpose." So that he decided upon evidence which convinced him that there had been such an arrangement. It is therefore also an authority showing that the consent of the wife was necessary.

There is very little other authority on the point. There is an earlier case of *Darkin v. Darkin* (*), which was before the same judge, where he says this: "They"—that is, the shares—"were transferred to the husband with the assent of the wife; and if he had continued to receive the dividends, then, according to *Caton v. Rideout*, it might be inferred; that the wife knew of the manner in which they were applied, and had agreed that her husband should receive them for his own use and benefit." Then he says, that objection is met by contradictory evidence, but he puts it there according to his view of *Caton v. Rideout* (*); and I am *showing, therefore, that the same judge does not and [592 cannot intend to take a different view from that taken in *Payne v. Little* (*), where he considered that the wife had agreed.

The only other authority that I need mention is *Parker v. Brooke* (*), before Sir William Grant, which was a singular case. I think there was pretty strong evidence that the wife did not assent. The wife was entitled, under her father's will, to a lease. As there was no trustee, the husband became trustee of it, but it was for her separate use. The husband renewed the term in his own name, apparently not knowing anything of the rule of equity which made him a trustee, and after his death his representative was sued for an account of the rent, both of the original and the renewed term, and an attempt was made to limit the account to the time of the husband's death, the husband and wife living together; and we find this (*): "As to the account prayed against the representative of the husband, it was compared to the case of pin money; the account which is not carried back farther than a year. On the other side it was insisted, that the husband, having received property, settled to the separate use of his wife, clearly must account for it; and the Master of the Rolls said, there could not be any doubt in giving the account." There are no reasons given there,

(*) 17 Beav., 578, 581.

(*) 9 Ves., 588.

(*) 1 Mac. & G., 599.

(*) 9 Ves., 588.

(*) 26 Beav., 1.

but when you look at the facts you will see that the wife could not be presumed to have assented. Neither husband nor wife apparently knew of the rule of equity that made the renewed lease the wife's property; and therefore there could not have been the presumption of assent, she not knowing the facts. So far as it goes, it is an authority, therefore, that, without knowledge, you must not presume assent.

The only other book which I intend to refer to is the last edition of Mr. Macqueen's book on Husband and Wife, and he states his view of the law⁽¹⁾. I only cite this as being a well known text-book, and it is as well to see how it is stated. "If the wife see her husband receive her separate property and do not make a claim to it, she will in general, and, unless there be circumstances suggesting an opposite construction, be held to have made a gift of it. But if the circumstances 593] do not warrant the inference *that the wife has assented to" (now he is using the words of Lord Romilly) "or acquiesced in the husband's receiving her income, or in his mode of applying it, she will be entitled to reimbursement out of his estate." He puts it on the ground of assent.

Now, the case before me is this. The property in question was improperly invested by the trustee in the purchase of East Indian Railway stock in the names of the husband and himself. The trustee died, and some time after the husband sold out the proceeds and pocketed the money—a transaction which, of course, speaks for itself. The wife did not know of it. The husband would, of course, be liable to replace the money, or replace the stock which was sold out, and the representatives of the trustee are also liable. But the defendants say, that from the date of the sale by the husband until, as I understand, the husband went away, or they ceased to live together, the wife loses the income, because prior to that time she allowed her husband to receive the dividends and retain them, and he maintained her.

That does not appear to me to be so. I cannot presume an assent by the wife to his retaining for himself the interest he was liable to pay upon the money which was received by the sale of the stock, or the dividends he was liable to make good on the stock if not sold out. She did not know that he had got the money. She did not know, therefore, that he was putting this sum into his own pocket. She might have been presumed to go on assenting to his doing what had been done before, namely, receiving the actual income; but I cannot presume an assent to his receiving that which

(1) Page 332.

she did not know that he was receiving at all, and the whole foundation of the doctrine depends upon her consent, either express, which is actual consent, or implied, which is sometimes called acquiescence—very properly so, if she knew of the fact of his receiving the income, and if she allowed him to retain it. It appears to me that this defence cannot be sustained, and I am of opinion that the dividends which the trust fund, if it had remained in the stock, would have produced, should be paid to the wife from the time when the East Indian Railway Stock was sold out by the husband.

Solicitors: *Harrisons; Henley Gröse Smith.*

See 22 Eng. Rep., 670 note; 25 Eng. Rep., 320 note.

Where property conveyed to the wife under a valid settlement made by the husband was, by their joint act, afterwards appropriated to the payment of one of his creditors, held that subsequent creditors and his assignee in bankruptcy could not rightfully complain: *Stewart v. Platt*, 101 U. S. R., 731.

A wife furnished part of the money to buy a piece of property purchased by her husband. He afterwards sold it for a greatly increased sum, repaid her money, and also gave her a considerable portion of the price. With this money she purchased other property. Held, that this transaction was not fraudulent, as to the husband's creditors, and they had no claim upon the property bought by the wife, as all the money paid by her husband was due to her on account of her advance and the increase in the value of the land sold.

When a married man is not in debt or about to enter a hazardous business he can give his wife all or any part of his property, and such gift would be good against his subsequent creditors: *Mumma v. Weaver*, 2 Pearson (Penn.) 172, distinguishing *Coates v. Gerlach*, 44 Penn. St., 43, and *Parvin v. Capewell*, 45 Penn. St., 89.

1. Unless existing claims of creditors are thereby impaired, a voluntary settlement of property made by a husband upon his wife is not invalid.

2. The technical reasons of the common law arising from the unity of husband and wife, which would prevent his conveying the property directly to her for a valuable considera-

tion as upon a contract or purchase, have long since ceased to operate in the case of his voluntary transfer of it as a settlement upon her.

3. The intervention of trustees in order that the property may be held as her separate estate beyond his control or interference, though formerly held to be indispensable, is no longer required.

4. His reservation of a power of revocation or appointment to other uses does not impair the validity or efficiency of the conveyance in transferring the property to her, to hold until such power shall be executed, nor does it tend to create an imputation upon his good faith and honesty in the transaction.

5. Such a power does not, in the event of his bankruptcy, pass to the assignee: *Jones v. Clifton*, 101 U. S. Rep., 225.

One B., when in prosperous circumstances, purchased a house and lot, the conveyance being taken in his wife's name, and afterwards paid all his debts and continued prosperous and in good credit in his business for three years thereafter. It did not appear that his subsequent inability to pay his debts could reasonably have been within his knowledge at the time of the conveyance. Held, that these facts were sufficient to rebut the presumption of fraud arising from a want of consideration for the conveyance, and that the conveyance was valid as against subsequent creditors. B. retained about half his property, after deducting the amount transferred to his wife; held, that the settlement was not unreasonable nor utterly disproportionate to his means: *Carr v. Breese*, 10 N. Y.

Weekly Dig., 518, Court of Appeals, reversing 18 Hun, 184.

To make an ante-nuptial settlement void as a fraud on creditors, both parties to the settlement should concur in, or have notice of, the intended fraud.

The husband and wife, parties to such a settlement, are deemed, in the highest sense, purchasers for a valuable consideration. But if the settlement is not *bona fide*, the fact that it is made for a valuable consideration will not save it.

A marriage settlement cannot be made a cover for fraud. If the purpose is to delay or defraud creditors, and both parties are cognizant of it, the consideration of marriage will not support the settlement. If the amount of property settled is extravagant, or grossly out of proportion to the station or circumstances of the husband, and he is embarrassed by debt, and the other party knows it, this of itself is sufficient notice of fraud.

To ascertain the purpose of the grantor in a marriage settlement, evidence of fraudulent transfers by him to other persons at or about the time of the settlement is admissible. Actual knowledge, on the part of the prospective wife, of the fraudulent purpose of

the grantor in the marriage settlement is not necessary to avoid the deed. A knowledge of facts sufficient to excite the suspicions of a prudent person and put her on inquiry amounts to notice, and is equivalent to actual knowledge: *Wilson v. Prewett*, 8 Woods, 631.

Where parties cohabit as husband and wife, the man's liabilities are, to the world, as if they are married; as between themselves, their rights of property should, in the absence of evidence, be as near as may be those of married persons. Property resulting from the man's business uninvested would belong to him; but where the property was invested in land, purchased with the man's knowledge in the woman's name upon which buildings were erected, with his knowledge, by money, the proceeds of his business, she having the legal estate it will, as between her and the beneficiaries under his will, be held to be hers. But *semble*, *ultra* as to creditors.

Property acquired on an illegal consideration cannot be recovered by volunteers under one party to the illegality from the other party; the position of the possessor as between them being lost: *Murdock v. Aherne*, 4 Vict. Law Rep., 244.

[9 Chancery Division, 595.]

M.R., July 27, 1878.

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**In re* WHITEHOUSE & Co.

Company—Voluntary Liquidation—Contributory—Debt due from Company—Right of Set-off against Calls—Companies Act, 1862, ss. 38, 101, 138.

Where a limited company is in voluntary liquidation, a contributory cannot set off a debt due to him from the company against calls made against him either by the company before or by the liquidator after the resolution to wind up.

Brighton Arcade Company v. Douling (1) disapproved of.

WHITEHOUSE & Co., Limited, was a company duly registered under the Companies Act, 1862.

At a meeting of the company held on the 7th of December, 1877, a resolution was passed for a voluntary winding-up, and a liquidator was appointed.

This was a summons taken out by the liquidator, asking that David Rose and Henry Fulwood Rose, who had both been settled on the list of contributories, might be ordered to pay respectively the sums of £289 2s. 9d. and £142 7s.

(1) Law Rep., 3 C. P., 175.

alleged to be due from them in respect of calls made, as to part, by the directors of the company shortly before the date of the resolution to wind up, and as to the remainder, by the liquidator since that date.

Against his call David Rose claimed to set off the sum of £272 17s. 5d. due to him from the company on two promissory notes; and Henry Fulwood Rose, being a creditor of the company for £2,500 advanced by him on mortgage, refused to make any payment whatever on account of his call, contending that he was entitled to set off the same against the mortgage debt.

Both contributories were admitted by the liquidator to be creditors of the company for the amounts claimed.

The summons was argued before his Lordship in chambers, but was, by his Lordship's direction, adjourned into court for judgment.

Millar, for the liquidator, contended that there was no right in a shareholder to set off a debt due to him from the company *against calls in a voluntary winding-up; [596 and cited *Grissell's Case* ('); *Black & Co.'s Case* ('), in which the contrary decision of the Court of Common Pleas in *Brighton Arcade Company v. Dowling* (') was disapproved of; *Gibbs and West's Case* ('); and *Stone v. City and County Bank* (').

Everitt, for Messrs. Rose, relied on *Brighton Arcade Company v. Dowling* as an authority precisely in point; and also cited *Barnett's Case* ('), in which *Calisher's Case* (') was discussed.

JESSEL, M.R.: This case was argued before me in chambers, but as it raised a question of very great general importance, and as to which the authorities are conflicting, I said I would give my judgment in court, and I now give judgment accordingly.

The application was an application under the 138th section of the Companies Act, 1862, by the liquidator under a voluntary winding-up of this company, that two contributories of the name of David Rose and Henry Fulwood Rose might pay sums respectively of £289 2s. 9d. and £142 7s. which were due from them partly in respect of a call made by the company before the winding-up, and partly in respect of a call made by the liquidator in the course of the voluntary winding-up.

(¹) Law Rep., 1 Ch., 528.

(²) 8 C. P. D., 382.

(³) Law Rep., 8 Ch., 254; 4 Eng. R., 880.

(⁴) Law Rep., 19 Eq., 449; 10 Eng. R., 819.

(⁵) Law Rep., 8 C. P., 175.

(⁶) Law Rep., 5 Eq., 214.

(⁷) Law Rep., 10 Eq., 312.

The amounts due on the calls were not disputed, but the contributories claimed to be allowed as set-off, as regards David Rose, nearly the whole amount of the claim, and as regards Henry Fulwood Rose, the whole amount, because he said he was a creditor for a larger sum. The liquidator admitted that the two contributories were creditors for those respective amounts, and therefore the only question that I have to decide is whether, under those circumstances, they were liable to pay the calls, or whether they were entitled to the benefit of the sets-off claimed.

Now the question as regards set-off has been the subject of judicial decision, and no doubt is a matter of the greatest [597] importance. *On the one side there is an authority, which I must consider in point, cited on behalf of the contributories; and on the other side there are certain authorities cited—and to which I shall refer—questioning the soundness of that authority.

The case cited on behalf of the contributories was the case of the *Brighton Arcade Company v. Dowling* (*). The chief cases cited on behalf of the liquidator were the well-known case of *Grissell* (**) and the case of *Black & Co.* (***), which certainly throw very great doubt on the decision of the Court of Common Pleas.

On considering the matter, I came to the conclusion that it was open to me to decide the case, notwithstanding the case in point decided by the Court of Common Pleas, and notwithstanding that the case was decided ten years ago, and was a decision of the full Court of Common Pleas.

Now the real point, I think, should be first considered on principle; then I will consider one or two sections of the act of Parliament, and then the authorities.

First of all, it must be remembered that at common law there was originally no right of set-off at all, and it was not till the statutes of set-off in the beginning of the reign of George II, that there was any such right established; and when we look at the terms of those acts of Parliament—there were two of them (*)—it is plain they only applied to what was then an action at common law—and so it has been held—and that they only applied to the case of mutual debts, whatever they might be. That was followed by the courts of equity and extended; that is to say, certain cases were held to be within the equity of the statutes, although not within their actual words. Courts of equity allowed

(*) Law Rep., 3 C. P., 175.

(**) Law Rep., 1 Ch., 528.

(***) Law Rep., 8 Ch., 254; 4 Eng. R., 880.

(*) 2 Geo. 2, c. 22, s. 13, and 8 Geo. 2, c. 24, ss. 4, 5.

set-off, but the Court of Equity, following the spirit of the statutes, would not allow a man to set off, even at law, where there was an equity to prevent his doing so; that is to say, where the rights, although legally mutual, were not equitably mutual.

That being the state of the law, it is obvious that when you have a demand at law to set off against a plaintiff, it must be *a demand of something due from the plain- [598 tiff to the defendant, otherwise there would be nothing to set off. If the claim against the plaintiff were assigned or otherwise disposed of for value, the set-off would not arise at all; and the same principle applies in other cases where the legal demand is transferred or assigned. We have often had the well-known illustration of a bill of exchange indorsed over for value before it is due, so as no longer to be in the hands of the defendant at the time of action brought. That being so, a question would immediately arise, if one of the parties became bankrupt, as to whether there was any set-off or not. In the case of bankruptcy the moneys due to the bankrupt before the bankruptcy would be distributable amongst the creditors and no longer payable to the bankrupt; and inasmuch as the Bankruptcy Acts enabled the assignee, who is now called a trustee, to sue in his own name—for he took under a legal assignment—of course, if he sued a defendant, there was no debt due from him to the defendant, although there might be a debt due from the bankrupt to the defendant, and consequently, in terms, this form of set-off would not apply. It was to avoid that injustice that in the Bankruptcy Acts clauses of set-off were inserted, and which clauses are in fact rather wider than the Statutes of Set-off. I only observe upon that to show that, in disposing of the bankrupt's rights as against his debtors, the Legislature found it necessary, in order to ascertain what should be included in the assets for the payment of creditors generally, to insert special provisions for set-off, otherwise there might be none.

So the law stood as regards individuals; and as regards companies there were several acts of Parliament for winding them up, and finally the act of 1862. Before going into the details of that act, I may state the scheme of the act as regards winding-up—which was this, that the assets of the company were to be collected by the liquidator and distributed among the creditors; and in the case of an insolvent company it was very like bankruptcy; but if the assets were to be so distributed, of course, if the liquidator sued

in his own name, he would not be indebted at all to the man to whom the company was indebted, and there would be no strict right of set-off. Whether that was affected or not by the provisions of the act that enabled him to sue in 599] the name of the company, *I will consider further on. If he comes under those sections—notably the 138th section—in a voluntary winding-up, he comes in his own name as liquidator to enforce a call, and strictly speaking, there is no actual set-off, because he is not indebted.

If, therefore, you want a set-off at all, you must show some provision in the act itself giving the right of set-off, because in principle there is no such right. The debt due to the liquidator is distributable among the creditors, and the debt due to the individual from the company would only rank with the view of obtaining a dividend for the creditor for the amount due. The two debts are not applicable to the same purposes, and could not properly be made the subject of set-off. Therefore it appears to me that the onus lies upon the man who says that there is this right of set-off to point out the provisions in the act of Parliament giving that right.

Now, when we look at the act of Parliament, which is the next thing I have to consider, it is plain there is no such right. First of all, it must be remembered that the 38th section of the act, which directs what is to be paid in the case of a winding-up by the shareholders of a limited company, creates new rights, and rights which did not exist before the passing of the Companies Act, 1862, and rights which do not exist till there is a winding-up. That point was decided by the House of Lords in the case of *Webb v. Whiffin* (¹), that it was in fact a new right, or rather a new liability as regards the shareholders; and that section alone, for this purpose, regulates their liability.

When you come to look at the section you find that it applies to all kinds of winding-up; that is to say, to a winding-up by an order of the court, to a winding-up voluntarily, and to a voluntary liquidation under the supervision of the court; there is no distinction. The section says: "In the event of a company formed under this act being wound up, every present and past member of such company shall be liable to contribute to the assets of the company to an amount sufficient for payment of the debts and liabilities of the company." That is a new liability; he is to contribute; it is a new contribution. It is a mistake to call that a debt due to the company. It is

(¹) Law Rep., 5 H. L., 711.

no such thing. It is not, *as has been supposed, in [600 any shape or way a debt due to the company, but it is a liability to contribute to the assets of the company; and when we look further into the act, it will be seen that it is a liability to contribution to be enforced by the liquidator. It is quite true that a call made before the winding-up—and in the case before me a call was made before the winding-up—is a debt due to the company, but that does not affect this new liability to contribution.

But there are certain limits to the liability. This being a limited company, the only limit which it is necessary to refer to is that stated in the 4th sub-section of the 38th section: "In the case of a company limited by shares, no contribution shall be required from any member exceeding the amount, if any, unpaid on the shares in respect of which he is liable as a present or past member." Now, first of all, as regards the calls made in the winding-up, they being calls for something unpaid on the shares, that is a contribution due by the member under the act, and is not a debt due to the company. The contribution also under this section applies to the unpaid calls made before the winding-up; because, though that is a debt due to the company, it is not the less an amount unpaid on the shares in respect of which he is liable, and therefore he must be liable to contribute all that is unpaid on his shares. As I said before, it is as much unpaid if he had not paid the calls made before the winding-up, as it is in respect of the amount unpaid on the shares in respect of which no call has been made before the winding-up. It seems to me that the contributories' liability created by the 38th section being only limited to the amount unpaid, it is immaterial, for the purpose of this section, whether the call was made before or after the winding-up provided the amount is unpaid. That being so, it is a liability to contribute which, in the case of an ordinary winding-up, is of course enforceable by the court; but so it is in a voluntary winding-up.

Then the 138th section of the act says that the liquidator may apply to the court "to exercise, as respects the enforcing of calls, or in respect of any other matter, all or any of the powers which the court might exercise if the company were being wound up by the court;" and this summons is taken out under that section. *There is, therefore, [601 no difference whatever; the liquidator may come to the court in a voluntary winding-up, and say "Enforce the payment of the contributions due from the contributories under the 38th section."

It appears to me there is no possible distinction when you look at those two sections between the duty of the court when applied to by a voluntary liquidator, and the duty of the court when applied to by an official liquidator. If there is no debt due from the contributory to the company, how can he set off a debt due from the company to him against the contribution? It is a contribution to the assets enforceable by the liquidator, and not at all a debt. When you look at the act there is really no question of set-off as between calls—that is, the amount unpaid on the shares—and a debt due by the company to the contributory.

Then there is one other section which I may refer to in addition to the sections that enable the liquidator to sue in the name of the company if he thinks fit. The 101st section—and I think it is the only section which deals in terms with this right of set-off—has an application to debts; but it does not at all interfere with the 38th section as to liability to contribution. The 101st section is this: “The court may, at any time after an order for winding up the company, make an order on any contributory for the time being settled on the list of contributories, directing payment to be made, in manner in the said order mentioned, of any moneys due from him or from the estate of the person whom he represents to the company, exclusive of any moneys which he or the estate of the person whom he represents may be liable to contribute by virtue of any call made or to be made by the court in pursuance of this part of this act.” That excludes calls in the winding-up. It would include a call made before the winding-up. Then it goes on, “And it may, in making such order, when the company is not limited, allow to such contributory by way of set-off any moneys due to him or the estate which he represents from the company on any independent dealing or contract with the company, but not any moneys due to him as a member of the company in respect of any dividend or profit: Provided that when all the creditors of any company, whether limited or unlimited, are paid in full, any 602] moneys due on any account whatever to any *contributory from the company may be allowed to him by way of set-off against any subsequent call or calls.”

Therefore this section empowers the court to direct payment of any debt of the company, and it may allow, where the company is not limited, a set-off. Surely that does not allow the court to do it where the company is limited. If there is any implication to be drawn from the section at all, it is that set-off is not to be allowed when the company is

limited, though I do not think that is wanted, because, as I said before, I can see no ground on principle, on looking at the sections of the statute, for saying that there is a debt due from the contributory to the company, it being in fact the amount of his contribution to the assets for the benefit of the creditors.

So that when you look at the 101st section, so far as it goes it strengthens—if that was wanted—the proposition that there is no set-off to be allowed in the case of a limited company, for a sum of money due from the company to a person liable to the company. The proviso shows that when all the creditors are paid you may set off whether the company is limited or unlimited. Here, again, the inference is that you cannot do it before the creditors are paid. So that when you look at the wording of the 101st section, it is quite plain, as it appears to me, that, having regard to that section as well as the other sections of the act, there is no ground for such a set-off as between the contribution under the 38th section, which includes calls made either before or after the winding-up—that is, anything unpaid on shares—and a debt due by the company to the contributory.

That being so on principle and on the construction of the act, I must now look at the authorities, because they are somewhat difficult to deal with.

Now in the first case cited on behalf of the liquidator, *Grissell's Case* (¹), in which the company was being wound up under a supervision order—I cannot find any such distinction taken as was afterwards taken by the Court of Common Pleas between a winding-up under an order of the court and a voluntary winding-up. It is laid down generally, that the shareholder who is also a creditor is not entitled to set off the debt due to him against the *calls [603 made in the winding-up; but I cannot find in Lord Chelmsford's judgment any notion that a distinction should be made between a voluntary winding-up and a compulsory winding-up.

Of course the question before the court being a question of contribution, was treated by Lord Chelmsford as one of contribution. He says (²), "The 75th section of the act enacts, that the liability of any person to contribute to the assets of a company, in the event of its being wound up, 'shall be deemed to create a debt accruing due from such person at the time when his liability commenced, but payable at the time or respective times when calls are made as hereinafter mentioned for enforcing such liability.' Until the

(¹) Law Rep., 1 Ch., 528

(²) Law Rep., 1 Ch., 535.

the call is made there is nothing more than a liability to contribute. This, indeed, creates a debt, but the debt does not accrue due till a call is made. The power to make calls is only to satisfy the debts and liabilities of the company, and the costs, charges, and expenses of winding it up, and for the adjustment of the rights of the contributories amongst themselves. But if the whole of the amount unpaid upon the shares were required to be paid up, more might be raised than would be requisite for these purposes." That shows the limit. The principle in *Grissell's Case* appears to me to cover the case of a voluntary winding-up as much as that of a compulsory winding-up.

The next case in order of date was *Calisher's Case* (*) which was decided a few days before the case before the Court of Common Pleas, and there Lord Romilly decided that you could not set off a debt due from the company to the contributory in the absence of special agreement. That latter part of the decision has been overruled, and it has been held that you cannot do so even by special agreement. But, subject to that, so far as the case before the court went, Lord Romilly decided most distinctly that the court could not, having regard to the terms of the 101st section and the decision of Lord Chelmsford in *Grissell's Case*, allow a contributory to set off a debt against a call.

The next case is the one which raises the whole difficulty; it is the case of the *Brighton Arcade Company v. Dowling* (*). The liquidator there brought an action for calls, 604] and the full *Court of Common Pleas held that the debt due to the contributory from the company was to be set off against the call. The way in which it was put by the court was this. Lord Chief Justice Bovill says (*): "*Prima facie* there is good debt disclosed by the declaration, and a good answer thereto by the fourth plea (of set-off). It lies therefore on the plaintiffs to show some law which prevents the application of the set-off."

Inasmuch as it appeared on the face of the action that it was a suit by the liquidator in the name of the company, it was not, as it appears to me, to be treated as if it was an action by the company whilst a going concern, and therefore the ground taken by the Court of Common Pleas fails, and under the provisions of the act of 1862 there is no set-off—in other words, the obligation of proof is the other way. They assumed there was, under the statute, a right of set-off after the winding-up, unless you could show it was taken away. There is no such right of set-off under the statute,

(*) Law Rep., 5 Eq., 214. (†) Law Rep., 3 C. P., 175. (‡) Law Rep., 3 C. P., 179.

where there is a contribution of this kind due to the assets of the company, and it is for those who allege set-off to show it. His Lordship then proceeds to show that there is an implication, if not an express prohibition, against such a plea, for he says, "If this had been the case of a company which was in course of being wound up by the court or under the supervision of the court, I should have had no hesitation in saying that the set-off could not be allowed." Therefore he does take the same view of the act as I do, with one exception—that he thinks there is a difference in the case of a voluntary winding-up; but his attention was not called to the fact that you would then get this absurd consequence, namely, that under the 138th section the voluntary liquidator could apply for payment to the court and the court could exercise all the powers it could exercise under the winding-up; but the liquidator could not get the benefit of the act, as regards payment by the contributory, in an action; and this extraordinary result would then follow, that he would get his demand, *minus* the set-off, in the action, and then come to the court under the 138th section for the balance, namely, for that sum which the Court of Common Pleas say should be allowed by way of set-off—which would certainly be remarkable.

*It was never intended by the Legislature that the [605 liquidator should, if he chose to proceed by action, amend his action by an order under the 138th section, nor could it be argued that, there being the right under the 38th section to get the whole amount of contribution without set-off, there could be a less right in an action.

That being so, all the argument of the Court of Common Pleas appears to me fallacious. The powers of the act of Parliament are enforceable on the application of a liquidator. If a company is insolvent a voluntary winding-up is more likely to take place than where a company is solvent; and can there be any reason for such a distinction as is alleged? If there were, you would have this consequence, that every case would have to be brought into court as to a right of set-off. That is a consideration which it seems to me was not dealt with by the Court of Common Pleas. The whole of the judgments of the judges of the full Court of Common Pleas proceed, as I said before, on the assumption that the Statute of Set-off applies unless the other side can show a negative. I think if you examine the act you can show the negative, but I do not think it is necessary to show the negative.

I should have gone into this matter more fully had it not

been for the elaborate discussion which the matter received from Lord Selborne in *Black & Co.'s Case* ⁽¹⁾. That was the case in which the court overruled the distinction which Lord Romilly thought might exist of a special contract, but in the course of it there is an elaborate discussion by Lord Selborne of the case of the *Brighton Arcade Company v. Dowling* ⁽²⁾, and he so clearly points out his reasons that it would be a work of supererogation on my part to repeat what he has indicated; and I need hardly say I entirely agree with what he says on the subject.

I have only one other case to notice, which is *Gibbs and West's Case* ⁽³⁾, before Vice-Chancellor Malins; and there is only one observation of the Vice-Chancellor in that case to which it is necessary for me to refer. After discussing ⁽⁴⁾ the decision in *Grissell's Case*, he refers ⁽⁵⁾ to the *Brighton 606] Arcade Company v. *Dowling* ⁽⁶⁾. He says, "I have been referred to the case of the *Brighton Arcade Company v. Dowling*, with regard to which I confess, after all that has been said upon it, and after all that learned judges have said, I am unable to see that it is not in conflict with *Grissell's Case*, which has settled that, where the liability is limited, the right to set-off cannot exist."

I merely cite that to show that at least one other judge has considered that there is a direct conflict between the authorities; but I am not by citing that case to be supposed to agree with the decision in other respects. Indeed, the observations I have made show that I could not agree with it. I cite it merely with reference to that observation.

That being so, I am in this position, that there is a decision of the Court of Common Pleas ten years old which is directly in point, and that decision, as I read it, is in conflict with a prior decision of the Lord Chancellor in *Grissell's Case* ⁽⁷⁾, and emphatically disapproved of by another Lord Chancellor in *Black & Co.'s Case* ⁽⁸⁾, and in conflict with the true interpretation of the act of Parliament. It appears to me that, having regard to the rules by which courts are bound, I am entitled to say that I am not bound by the decision of the Court of Common Pleas, and that I have a right to decide the case according to my own view of the act of Parliament, confirmed as it is by the high authority of the two Lord Chancellors in the cases I have cited, and also by the opinion of Vice-Chancellor Malins as to the conflict of the case in the Common Pleas with the case of *Grissell*.

⁽¹⁾ Law Rep., 8 Ch., 254; 4 Eng. Rep., 880.

⁽²⁾ Law Rep., 3 C. P., 175.

⁽³⁾ Law Rep., 10 Eq., 312.

⁽⁴⁾ Law Rep., 327.

⁽⁵⁾ Law Rep., 10 Eq., 330.

⁽⁶⁾ Law Rep., 1 Ch., 528.

That being so, I think that no set-off exists in the present case, and there will therefore be an order against the contributories for payment of the call, and they must pay costs of the application.

Solicitors for all parties: *Duignan & Smiles*, agents for *Duignan & Co.*, Walsall.

The owner of a paid-up policy of life insurance cannot set it off against a mortgage, against him, held by the company, if insolvent: *Waring v. Oneill*, 15 Hun, 105.

A savings bank, under a special charter, was authorized to receive and invest deposits for the benefit of the depositors, the income or profit to be divided among them after reasonable deductions for necessary expenses; the principal to be repaid to the depositors at such times and with such interest and under such regulations as the board of managers should from time to time prescribe. Under their regulations they not only received deposits, participating in the profits and not payable except on thirty days' notice, but also another kind of deposits (called by them "special deposits") which were not to participate in the profits, and were to be repaid (not redelivered) to the depositors without any preliminary notice. Both kinds of deposits were intermingled in the funds of the bank undistinguishably.

Under insolvent proceedings a receiver was appointed.

Held (1.) That such an institution is a mere trustee for the benefit of the depositors.

(2.) That a depositor who borrowed money from the bank, secured by his note or mortgage, cannot offset his debt against the amount of his deposit at the time when the decree of insolvency was made: *Stockton v. Mechanics, etc.*, 32 N. J. Eq., 163.

Contra: *New, etc., v. Tarlter*, 4 Abb. N. C., 215, 54 How. Pr., 385.

See Second, etc., *v. Hemingray*, 34 Ohio St. R., 381.

The assured, by a time policy upon a vessel, which provides that the loss, if any, shall be payable at a certain time after proof of loss and the interest, and that the premium shall be deducted from the loss, are entitled, in case of a general average loss, insolvency of the insurers, and an appointment

of a receiver of their assets, to have such loss set off against the claim of such policy.

A loss incurred by a solvent assured under a policy issued by insolvent underwriters, before the insolvency of the latter occurs, is a "mutual debt or credit" within the meaning of the statutes relative to trustees of insolvent debtors, capable of being set off against the premium upon such policy; although, by the terms of the policy, the loss be not payable until a certain time after proof of it and interest, and no such proof was presented to the receivers before such insolvency.

In such a case the loss is to be deemed to have occurred at the time of the injury to the vessel by the peril insured against. The making of the repairs out of which the claim arises, and the adjustment of such claim, only fix the amount of damages. The right to indemnity is fixed at the time of the injury: *Pardo v. Osgood*, 5 Robt., 348, reversing 2 Abb. (N.S.), 365.

A stockholder in a building company formed under chap. 122 of the Laws of 1851, who has made advances or incurred liabilities for the benefit of the corporation, may, when called upon to respond to his statutory liability, set off such advances or liabilities in extinguishment thereof: *Remington v. King*, 11 Abb. Pr., 278.

In a suit by an executrix to foreclose a mortgage which became payable after the death of the testator, the defendant cannot set off a claim against the latter though due at the time of his decease: *Patterson v. Patterson*, 59 N. Y., 574, 47 How. Pr., 242, modifying 1 Hun, 323.

See *Knecht v. U. S. Savings, etc.*, 2 Mo. App. Rep., 563.

So if not due till after his decease: *Jordan v. Shoe, etc.*, 12 Hun, 512, 74 N. Y., 467.

Otherwise as to money advanced to pay the funeral expenses of the testator: *Pasterson v. Patterson*, 59 N. Y., 574, 47 How. Pr., 242.

[9 Chancery Division, 607.]

M.R., Aug. 3, 1878.

607]

In re THOMPSON'S TRUSTS.Will—Bequest to "the Heirs or Next of Kin of A., deceased"—Gift to one Class, not alternative Gift—Statutory Next of Kin.*

Bequest of personalty to the heirs or next of kin of A., deceased :

Held to be a gift to one class, namely, the next of kin of A., according to the statute.

THIS was a petition for the payment out of court of a trust fund paid in under the Trustee Relief Act by the executors of Ann Thompson, deceased.

The testatrix by her will, dated the 23d of April, 1869, devised and bequeathed her leasehold houses and all other her real and personal estate to her executors, in trust for her nephew William Lodge for his life, and after his decease she directed the trustees to sell the same and stand possessed of the proceeds in trust to pay certain legacies, and as to the residue "in trust to divide the same into three equal parts, and pay the same as follows, namely, one third part to the heirs or next of kin of Thomas Lodge, deceased ; one third part to the heirs or next of kin of John Lodge, deceased ; one third part to the heirs or next of kin of Milburn Lodge, deceased.

The testatrix died in 1870, the said Thomas Lodge, John Lodge, and Milburn Lodge, having all predeceased her.

William Lodge died in 1874, and the proceeds of the sale of the property, after the other purposes of the will had been satisfied, were paid into court.

The present petitioners were John Sampson Lodge and Margaret Hannah Lodge.

John Sampson Lodge claimed to be entitled to one third of the fund as heir-at-law of John Lodge, and also as his nearest of kin and his sole next of kin according to the statute.

Margaret Hannah Lodge claimed to be entitled to one other third as heiress-at-law of Thomas Lodge, and also as his nearest of kin ; also she and her mother (since deceased) were his sole next of kin according to the statute.

The petition prayed that one third of the fund might be paid to *John Sampson Lodge, that one other third might be paid to Margaret Hannah Lodge, and that the remaining third might be carried over to the account of the share of the next of kin of Milburn Lodge.

Cracknall, for the petitioners.

Herbert Percival, for Henry William Lodge, one of the next of kin of the testatrix: The gift is void for uncertainty. A bequest of personalty to the "heirs" of an individual goes to such heirs as *personæ designatæ*, or to the statutory next of kin, as in the case of *In re Steevens' Trusts* ('). A gift to the "next of kin" of an individual without more goes to the nearest blood relations as joint tenants. Whichever construction is put on the word "heirs" in this gift, the persons taking under it are distinct from those taking under the words "next of kin." In *Lowndes v. Stone* ('), a gift to a testator's "next of kin or heir-at-law" was held to be void for uncertainty.

[JESSEL, M.R.: In that case the word was "heir-at-law." Here she speaks of "heirs" as a class which seems to show that she looked upon the heirs and next of kin as being the same class.]

I submit that the principle of that case is applicable here, and that the next of kin of the testatrix are entitled to the fund.

Philpotts, for the executors of the heir-at-law of Milburn Lodge, who was also one of his two nearest of kin as well as one of his three statutory next of kin: I contend, first, that the heir-at-law took as being the person to whom the whole description of "heirs and next of kin" applied. There is no one else who answers the whole description. If that contention fails, then I contend that the only way to avoid uncertainty is to read "or" as "and" on the principle on which *Eccard v. Brooke* (') was decided, where in a gift "to A. or her children," "or" was read "and" to prevent the gift from being void for uncertainty.

**O. A. Saunders*, for another of the three statutory [609 next of kin of Milburn Lodge.

W. D. Rawlins, for the trustees.

JESSEL, M.R.: I think that the rational construction to put on this will is this, that the testatrix meant, not to make an alternative gift; but that both the terms "next of kin" and "heirs" should apply to one class. That being so, the next question is, what is the class designated? She gives her real and personal estate to trustees in trust for her nephew for life, and after his death in trust for sale, and after payment of legacies, as to the residue, to pay "one third to the heirs or next of kin of Thomas Lodge, deceased; one third to the heirs or next of kin of John Lodge, deceased; and one third to the heirs or next of kin of Milburn

(') Law Rep., 15 Eq., 110; 5 Eng. R., 746.

(') 4 Ves., 649.

(') 2 Cox, 213.

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Lodge, deceased." She describes these persons as "deceased," showing that she knows they are all dead, and she gives to a class described as "the heirs or next of kin" of each. Is there such a class as this who, in a gift of personal estate, can be thus described? There is such a class, for as regards personal estate the word "heirs" is used for statutory next of kin, and as the testatrix meant both descriptions to apply to the same class, it follows that the gift is in favor of the statutory next of kin of the three persons named. The petitioner John Sampson Lodge is entitled to one third; the petitioner Margaret Hannah Lodge to another third; and the next of kin of Milburn Lodge, according to the statute, to the remaining third.

Solicitors: *Clarke, Rawlins & Clarke*, agents for Moore, South Shields.

[9 Chancery Division, 610.]

M.R., Aug. 6, 1878.

610] *PULBROOK V. RICHMOND CONSOLIDATED MINING COMPANY.

[1878 P. 166.]

Company—Director, Exclusion of—Injunction—Qualification—Trust Shares—Shares held "in his own right."

A director of a company can, if qualified, sustain an action in his own name against the other directors, on the ground of individual injury to himself, for an injunction to restrain them from wrongfully excluding him from acting as a director.

Where the articles of association of a company provided that no person should be eligible as a director unless he held "as registered member in his own right capital of the nominal value of £500 at least":

Held, that beneficial ownership was not necessary for a qualification, and that a registered holder of the required capital, though he had transferred his shares to another, was properly eligible.

THIS was a motion to restrain the directors of the defendant company from restraining or in any way interfering with the plaintiff's acting as a director of the company.

The articles of association of the company provided as follows:

Art. 54. "No person shall be eligible as a director unless he holds as registered member in his own right capital of the nominal value of £500 at least."

Art. 65. "A director is to vacate his office if at any time he holds less than the nominal amount of capital required as his qualification for election."

On the 23d of August, 1877, the plaintiff, whose name appeared on the register of the company as the holder of 100

shares in the capital of the company of the nominal value of £500, was elected a director.

Prior to his election, in January, 1877, the plaintiff had executed a deed of transfer of his shares to William Cuthbert, as he alleged, by way of mortgage as a security for money borrowed on his shares, and it was agreed between them that the transfer should not be registered.

On the 18th of January, 1878, Cuthbert, through mistake as the plaintiff alleged, took the transfer to the secretary of the company, who registered the same and inserted Cuthbert's name as holder of the shares transferred to him by the plaintiff.

*Notice of this entry on the register having been [611] given to the directors, the plaintiff was not allowed to take his seat at the board. The plaintiff thereupon took out a summons in the Common Pleas Division to rectify the register, and by an order of Mr. Justice Field of the 1st of March, 1878, the name of Cuthbert was ordered to be struck out as the transferee of the said shares and the name of Pulbrook inserted as the holder of the same. On the 20th of June, 1878, this order was affirmed on appeal by the Divisional Court, the plaintiff undertaking not to question any of the prior acts of the directors.

On the 25th of June, 1878, the plaintiff took his seat at the board and produced the order, but the other directors refused to permit him to act, whereupon he brought his action against the company and the other directors. The present motion was made to restrain the directors by injunction from thus interfering with his rights.

Chitty, Q.C., Brooksbank, and Boome, in support of the motion: The plaintiff in this case was duly elected a director, and was qualified under clause 54 of the articles of association. The fact of his having mortgaged his shares does not affect his qualification, as the provision that "no person shall be eligible unless he holds in his own right capital of the nominal value of £500" does not mean that he shall be necessarily beneficial owner of the shares. The court will not look behind the register. By sect. 30 of the Companies Act it is provided that "no notice of any trust, expressed, implied, or constructive, shall be entered on the register." The transfer to Cuthbert was registered by mistake, and the plaintiff's name having been restored by the order of Mr. Justice Field, affirmed by the Divisional Court, he cannot be held to have vacated his seat under clause 65. The plaintiff has sustained an individual wrong by being now excluded from the board, and is entitled to maintain his

action and to restrain the other directors from preventing him from acting.

Davey, Q.C., and *W. Barber*, for the other directors: This action is not properly brought. An individual director cannot thus sue the other directors. If a wrongful act [612] has been *committed the action should be brought in the name of the company. When the company is injured by the improper exclusion of a director from the board the company is the proper party to sue. Besides, the plaintiff was not at the time of his election the holder in his own right of capital of the value of £500. He had previously transferred his shares, and, though it is alleged that he only transferred them by way of mortgage, there is nothing to show that he had not transferred them out and out. When that transfer was registered he ceased even to be the ostensible holder of the shares, and under clause 65 he was bound to vacate his office. The fact of his name being restored to the register by the order of the Court of Common Pleas does not entitle him to take his seat as a director, and the other directors cannot be restrained from excluding him from the board.

[*Pender v. Lushington* (') and *MacDougall v. Gardiner* (') were referred to.]

JESSEL, M.R.: This is a motion which raises some points of great importance.

The first question is, whether a director who is improperly and without cause excluded by his brother directors from the board from which they claim the right to exclude him, is entitled to an order restraining his brother directors from so excluding him.

In this case a man is necessarily a shareholder in order to be a director, and as a director he is entitled to fees and remuneration for his services, and it might be a question whether he would be entitled to the fees if he did not attend meetings of the board. He has been excluded. Now, it appears to me that this is an individual wrong, or a wrong that has been done to an individual. It is a deprivation of his legal rights for which the directors are personally and individually liable. He has a right by the constitution of the company to take a part in its management, to be present, and to vote at the meetings of the board of directors. He has a perfect right to know what is going on at these meetings. It may affect his individual interest as a shareholder as well as his liability as a director, because it has been sometimes held that even a director who does not at-

(') 6 Ch. D., 70; 22 Eng. R., 640.

(*) 1 Ch. D., 13; 15 Eng. R., 624.

tend board meetings is bound to know what is done in his absence.

*Besides that, he is in the position of a share- [613 holder, of a managing partner in the affairs of the company, and he has a right to remain managing partner, and to receive remuneration for his services. It appears to me that for the injury or wrong done to him by preventing him from attending board meetings by force, he has a right to sue. He has what is commonly called a right of action, and those decisions which say that, where a wrong is done to the company by the exclusion of a director from board meetings, the company may sue and must sue for that wrong, do not apply to the case of wrong done simply to an individual. There may be cases where, by preventing a director from exercising his functions in addition to its being a wrong done to the individual, a wrong is also done to the company, and there the company have a right to complain. But in a case of an individual wrong, another shareholder cannot on behalf of himself and others, not being the individuals to whom the wrong is done, maintain an action for that wrong. That being so, in my opinion, the plaintiff in this case has a right of action.

In the next place, assuming him to have a right of action, has he a right to restrain his brother directors from acting without him? That must depend on the question whether he is a director properly elected.

Now, it does not appear to me in this case that the company has any power to remove him. They certainly have not exercised it. Therefore if he were elected a director, and has remained a director, he ought to be allowed to exercise his functions as a director. That he was validly elected in August, 1877, is not disputed; his period of office has not expired, and at the time he was elected he had the qualification of holding capital of the nominal value of £500. But it is said that before his election he had executed a deed of transfer to one Cuthbert of these shares. On the one side it is said that the transfer was executed by way of mortgage, and on the other side it is said that there is nothing to show that it was so.

The words of the 54th clause in the articles of association are: "No person shall be eligible as a director unless he holds as registered member in his own right capital of the company of the nominal value of £500 at least." When it says, "No person shall *be eligible, that does not [614 necessarily vacate the election if it takes place, for although

improperly elected he might still be *de facto* a director, though not *de jure* a director.

Then the 65th clause says, "A director shall vacate his office if he at any time hold less than the nominal amount of capital required as his qualification of election." It does not repeat the words in the 54th clause, "in his own right," so that that does not in form make him vacate his office. But it may be that the election was void when you take the two clauses together, and that, upon this being discovered, you might put somebody else in his place. Then it comes to this: what is the meaning of the words "in his own right"? He is to hold "as registered member in his own right;" what then is the meaning of "registered member"? Under the terms of the act of 25 & 26 Vict. c. 89, s. 30, I find these words, "No notice of any trust, expressed, implied, or constructive, shall be entered on the register, or be receivable by the Registrar, in the case of companies under this act." So that it cannot appear on the register itself that he holds the shares in trust, but he is to hold as a "registered member." Therefore, when you come to see those words, that it cannot appear on the register, and that you are to find out on the register whether he is a "registered member in his own right," it cannot mean that he is to be beneficial owner. It must have some meaning. What does it mean?

There are provisions in the act of Parliament, and indeed in these articles of association, for persons who do not hold in their own right being registered members. I will read one of them, the 17th, which is this, "Any person becoming entitled to a registered share in consequence of the death or bankruptcy of any member, or in consequence of the marriage of any female, may be registered a member in respect of such shares, or without being so registered, may transfer the share;" and the 16th clause says, "The executors or administrators of a deceased member shall be the only persons recognized by the company as having any title to a share registered in the name of such member." Therefore, under the combined effect of these two clauses, a man may be registered as executor or as administrator, or as trustee in bankruptcy, or as the husband of a lady herself a shareholder.

615] *Therefore there are at least three separate classes of persons who may be registered, and who will not be registered as members in their own right, but in the right of other persons. Others might so hold shares, such as committees, and guardians of infants and of persons of unsound

mind. The company cannot look behind the register as to the beneficial interest, but must take the register as conclusive, and cannot inquire, either for this purpose, or indeed for any other, into the trusts affecting the shares. That being so, in my opinion, whether or not there was an absolute trust, or whether Mr. Cuthbert was only the mortgagee, is not material; M. Pulbrook was well elected, and if nothing else had occurred he would undoubtedly have continued a director. But something else occurred.

After Mr. Pulbrook had been some time a director, Mr. Cuthbert, through some mistake took the transfer to the secretary of the company, who duly registered it. It seems the fact was brought before the directors. That being so, an application was made to Mr. Justice Field at chambers, under the 35th section of the Companies Act, to rectify the register. It would ill become me to make any observation upon that decision of Mr. Justice Field. It is not for me to say whether I should have come to the same decision or not. I am bound by it. I shall not comment upon it further than to say I am bound by it. The order was: "That the Richmond Consolidation Mining Company, Limited, do rectify the register of members of the said company by striking out the name of William Cuthbert therefrom, as the transferee of 100 shares from Anthony Pulbrook." That order was appealed from to the Divisional Court and affirmed. So there are two decisions of two courts on the same point in the same matter. The result is that, rightly or wrongly, but I am bound for this purpose to assume rightly, the name of Mr. Cuthbert has been struck out of the register and the register rectified. The effect of that is exactly the same as if it had never been put in. That is the meaning of "rectified." You strike it out by way of rectification, and the court has therefore declared that it ought never to have been entered at all. They have struck it out from the beginning.

The result is, so far as regards registration of that transfer, there is no registration, and never was for this purpose, and consequently *Mr. Pulbrook remains rightly a [616] director. I see that the Divisional Court took an undertaking from him not to question the interim acts of the directors. Therefore he cannot complain of anything that was done in his absence not having been duly done. Whether he could have complained is quite another question. It appears to me that Mr. Pulbrook is a director, lawfully elected, and that he has not vacated his office.

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Therefore I think he is entitled to an injunction to restrain the directors as asked.

Solicitors: *A. Pulbrook; H. W. Vallance.*

In the case of a private corporation a director, who is a stockholder, has a *personal* interest in being allowed to protect himself and his associate stockholders. In the case of a public officer he has no individual, personal, interest; no greater interest than any other citizen, and there is some apparent conflict as to his right to compel associate officers to allow him to act with them: See *High on Inj.*, §§ 774, 798.

In *Colin v. Aldrich* (98 Mass., 557), it was held that mandamus lies to enforce the right of a member of a school committee to act as a member of the board to the exclusion of a person whom the other members wrongfully recognize and permit to act in his stead.

In the matter of *Gardner* (68 N. Y., 467), it was held that a writ of mandamus, upon the application of one claiming title to an office, will not be granted for the purpose of determining the validity of his claim, where there is a question in regard thereto, and another person is holding and exercising the functions of the office, and this, although the attorney-general refuses to bring an action in the nature of a quo warranto.

The clerk of a board of supervisors has no authority to direct or control any of its proceedings, and a mandamus will not be granted, directed to and requiring him to recognize the relator as a member of the board, and to record his vote as such: In the matter of *Gardner*, 68 N. Y., 467.

This case, however, seems to have been put upon the ground that there was serious doubt as to the relator's being *de jure* an officer, and that the court would not, on mandamus, try the title to the office.

See *People v. Treasurer*, 36 Mich., 416.

It is not the proper office of a writ of mandamus to restrain a party claiming to be a public officer from exercising his office, or to enjoin one claiming to have been elected or appointed to an office from qualifying: *People v. Ferris*, 76 N. Y., 326, affirming 16 Hun, 219.

Whenever the act sought to be enforced requires the exercise of discretion, the remedy by mandamus will not lie. The power of a city council to judge of the election and qualifications of its members, involves the exercise of judgment and discretion, and their determination in that respect cannot be reviewed by mandamus: *Hildreth v. Heath*, 1 Bradwell (Illa.), 82.

In other cases, however, where the common council were made the judges of the qualifications and election of members of their bodies, it has been held the courts were not ousted of jurisdiction to pass upon the question. The power of the common council is concurrent but not exclusive: *Com. v. Allen*, 70 Penn. St. R., 465; *McVeaney v. Mayor*, 59 How. Pr., 106, Court of Appeals, reversing 1 Hun, 35, 3 Thomp. & Cooke, 131; *State v. McKinnon*, 8 Oregon, 493.

But see *Sellick v. Com. Council*, 40 Conn., 359; *Kerr v. Trego*, 5 Phila. Rep., 224, *Id.*, 229.

An injunction will not issue to restrain a party from taking possession of an office and its books and papers under color of title thereto: *Coulter v. Murray*, 15 Abb. (N.S.), 129; *Campbell v. Taggart*, 10 Phila. Rep., 443; *Updegraff v. Crans*, 47 Penn. St. R., 103; *People v. Draper*, 24 Barb., 265; *New York, etc., v. Roosevelt*, 7 Daly, 188.

See *Tappan v. Gray*, 9 Paige, 507, reversing 3 Edw. Chy., 450; *Ewing v. Thompson*, 43 Penn. St. R., 372; *Kerr v. Trego*, 47 *id.*, 292.

In *Jones v. Commissioners of Granville* (77 N. C., 280), it was held that an injunction would not lie to restrain officers from inducting another person into office, on the ground that he was not legally elected thereto.

See also *Patterson v. Hubbs*, 65 N. C., 119.

This action was brought by the plaintiff as a member of the society of Tammany, to restrain it, its agents, officers, etc., from initiating certain persons alleged to have been elected members thereof at a meeting held on December 31, 1878, and from doing anything to

complete or carry into effect such pretended election, on the ground that the meeting at which such persons were elected was irregularly and fraudulently held.

The complaint alleged that the society, unless restrained from so doing, would initiate such persons as members, which would injure and deprive the plaintiff of his legal rights, privileges and powers as a member, and of his rightful voice in the management and disposition of the property and affairs of the society. It was not claimed that plaintiff would be deprived of any pecuniary benefit by the admission of such members.

The defendant was incorporated by chapter 115 of 1805, as amended by chapter 593 of 1867, for the purpose of affording relief to the indigent and distressed members of the society, and to their widows and orphans.

Held, that a temporary injunction was improperly granted, and should be vacated :

That if the election was irregular, the plaintiff's proper remedy was by a summary application to the court under 1 R. S., 603, § 5 : *Thompson v. Society of Tammany*, 17 Hun, 805.

The judge below erred in granting an injunction by which the persons in possession of the offices of mayor and alderman of a city, and actually performing the duties of those offices, are restrained from all official acts. It is not sufficient to allege that the persons filling the offices were not regularly or rightfully elected, but it must also appear that they are abusing, or about to abuse, their possession of official power to the public injury, and that the public will sustain no damage by the suspension for an indefinite time of all city government : *State v. Wolfenden*, 74 N. C., 103.

Where a person is in possession of an office, and the common council unlawfully elects his successor, and thereby threatens to disturb him in the enjoyment of his term, certiorari is the appropriate remedy to review such action. The object of prosecuting a *quo warranto* is to have one in possession adjudged guilty of usurpation. The relator in this case sues for no such end ; his only purpose is to remove from his way a proceeding which he apprehends may be used unlawfully . 26 ENG. REP. 50

to eject him : *Bradshaw v. City Council*, 39 N. J. Law, 416.

The charter of the city of New York of 1873 prescribes the powers and duties of the board of health, and of the police board. The provisions made for this law for one department are not in any way subject to the control of another co-ordinate department, nor can one be dispossessed from the possession of premises belonging to the city of New York, by another in possession of other premises so belonging to the city, by force and without warrant of law.

Where such dispossession is attempted and it is shown that irreparable injury may ensue if carried out, a court of equity will stay such proceedings by injunction : *Health Dept. of N. Y. v. Police Dept. of N. Y.*, 51 How. Pr., 481.

The defendant, under an appointment by the city comptroller to the office of deputy chamberlain, undertook, by threats, etc., to intrude into and to take possession of that office, and to oust the deputy in possession, and doing the duties of the office under the appointment of the chamberlain, the plaintiff :

Held, that the process by injunction was the proper remedy of the plaintiff, and should be sustained upon the principle that it is a proper substitute for another remedy, which, had it been adopted, might have produced confusion and disorder in a public office, and perhaps serious loss to the city, if not to the immediate parties concerned.

For the plaintiff, until the title to the disputed office should be tried and established by due course of law, as the responsible custodian of the treasury of the city, and of the office in which his official business is transacted, and of the books and papers connected therewith, could properly exclude the defendant therefrom, and with force, if necessary, to prevent the usurpation of the office ; or that he could demand the aid of the civil authority to protect the office from any unwarrantable intrusion ; but instead of asserting his right thus to exclude the defendant, has adopted a measure more conformable to peace and order.

The object of the process of injunction is both preventive and protective. It seeks to prevent a meditated wrong,

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and not to redress an injury which can usually be done only at law, and then to protect a party against any unlawful invasion of his rights: *Palmer v. Foley*, 45 How., 110, 36 N. Y. Superior Court Rep., 14, modifying 44 How., 808. To same effect, *Ewing v. Thompson*, 43 Penn. St. R., 372; *Kerr v. Trego*, 47 id., 292.

[9 Chancery Division, 616.]

M.R., Aug. 7, 1878.

HARBORD V. MONK.

[1870 H. 160.]

Practice—Discovery—Delivery of Interrogatories by Plaintiff before Statement of Defence—Rules of Court, 1875, Order xxxi, r. 5.

In an action in the Chancery Division interrogatories may be delivered before the statement of defence.

Mercier v. Cotton (1) applies only to actions in the nature of common law actions.

(1) 1 Q. B. D., 442.

[9 Chancery Division, 623.]

V.C.M., July 8, 9, 10, 15, 1878.

623] *NORTON V. LONDON AND NORTH WESTERN RAILWAY COMPANY.

[1875 N. 13a.]

Railway Company—Adjoining Landowner—Easement over Railway—Superfluous Land—Abandonment.

A railway company purchasing land for the railway acquires an absolute fee simple, but such fee simple is acquired solely for the purposes of constructing and using the railway.

A railway company has no right to erect hoardings to prevent prescriptive rights being acquired for windows looking across the line of railway.

A railway company is liable to an action for nuisance for using their rights so as to injure the neighboring landowner where they might use them without such injury.

A railway company may by their conduct abandon land outside their fence which was formerly theirs, so as to permit the adjoining owner to acquire such land by adverse possession.

THE London and Birmingham Railway (which had been taken over by the defendants, the London and North Western Railway Company) was made under an act which contained provisions similar to those afterwards embodied in the Lands Clauses Acts.

In 1833 the London and Birmingham Railway took from Sir Charles Adderley land at Saltley, near Birmingham, for the purposes of their railway, and the land was conveyed to the company in fee simple by a deed containing the fol-

lowing general words: "Together with all coal, and other mines and minerals, and all easements connected therewith, and all right or title in me or any persons whom I can bind or affect, to cut or make any airways, headways, gateways, or water levels through or in any of the hereditaments or strata hereby conveyed, together with all ways, rights, and appurtenances thereto belonging."

In 1860 Sir Charles Adderley granted a lease to the plaintiff, Thomas Norton, of a piece of land on the northern side of the railway, where it ran through Sir Charles's land, for a term of ninety-nine years; and the land demised was described as "adjoining on the southern side thereof to the London and North Western Railway."

*On this land so demised to him the plaintiff at [624 once proceeded to erect an inn or public house called the Station Hotel. The front of the house opened upon a road, but the back part looked over the line of railway, and the seven windows at the back derived their light and air from over the railway. The plaintiff had full enjoyment of his house unquestioned by the railway company till the year 1874, when the company erected a signal box, which was used for the purpose of working the line of rails. The smoke from the chimney belonging to the signal-box was blown into the plaintiff's windows, and one object of this action was to obtain damages for this nuisance. The plaintiff made a complaint to the authorities of the railway company respecting the smoke, and subsequently the signal-box was removed. The railway company shortly afterwards claimed a rent from Mr. Norton for the privilege of uninterrupted light and air across their railway. This claim was refused, and thereupon the company erected a large hoarding directly in front of the plaintiff's house and within one foot of his windows, whereby the light and air were almost entirely excluded. The company persisted in retaining the hoarding for a period of six months, until, in December, 1875, it was accidentally blown down by the wind, but the company still claimed the right to shut out the light from the plaintiff's windows on the ground that they were justified in preventing adjoining landowners from acquiring easements over the line of railway which might prevent the railway company from afterwards erecting a building or station for the purpose of the railway.

The railway company, by way of counter-claim, contended that they were entitled to a small strip of land immediately outside the hedge bounding the company's railway. As to this, it appeared by evidence that it is the

practice of railway companies first to erect a post and rail fence at the extreme outside of the land taken for their line, then to plant and rear a quick-fence at a convenient distance within their boundary as a permanent fence, and to occupy the distance intervening between the outside post and rail fence and the quick-fence with a ditch for the protection of the quick-fence.

The railway company contended that a strip of land in the plaintiff's occupation outside their present quick-fence, 625] had *formerly been the ditch of the company, and was still the company's property. But the plaintiff produced evidence (which the court believed) that there had never been any such ditch, and also contended that if there ever had been one, the strip of land had been abandoned by the company, and the plaintiff's lessor was entitled to it either as superfluous land, or, under the Statute of Limitations, by reason of adverse possession.

J. Pearson, Q.C., and Romer, for the plaintiff: A railway company has no right to block up the lights of an adjoining landowner, so as to prevent him from acquiring an easement over the railway.

The ownership which the railway company has of its lands is a limited fee simple confined to the public objects of the railway: *United Land Company v. Great Eastern Railway Company* (1); *Bostock v. North Staffordshire Railway Company* (2). The adjoining landowners do not receive compensation calculated on the assumption that they can be built out and their light and air obstructed by the railway company.

As to the smoke, the company ought to have used the cabin in such a way as not to annoy the plaintiff: *Fenwick v. East London Railway Company* (3). As to the piece of land claimed by the company, we say they abandoned it under sect. 127 of the Lands Clauses Act. It is implied that all the land which is left outside the company's fence belongs to the adjoining landowner under 5 & 6 Vict. c. 55, s. 10, and sect. 16 of the Railways Act, 1845, which provide for the fencing of the railway.

Glasse, Q.C., Speed, and Dugdale, for the railway company: A conveyance of property to a company passes to the company all the rights and incidents belonging to that property: *Swindon Waterworks Company v. Wilts and Berks Navigation Company* (4). Is the company to be de-

(1) Law Rep., 17 Eq., 158; Ibid, 10 Ch., 586.

(2) Law Rep., 20 Eq., 544.

(3) 5 De G. & Sm., 384; 4 E. & B., 798; 3 Sm. & Giff., 283.

(4) Law Rep., 7 H. L., 697, 706.

prived of their right to erect a station at a given place because somebody may have built a small cottage there overlooking the railway?

*The presumption is that the ditch was upon the [626 company's land: *Vowles v. Miller* ('); *Doe v. Pearsey* ('). We have a right to prevent the plaintiff acquiring an easement against us: *Blanchard v. Bridges* (').

The company may prevent adjoining owners from acquiring prescriptive rights which will prevent them from building where they are likely to want to build.

The court must assume that the company will act reasonably: *Odessa Tramways Company v. Mendel* (').

As to the strip of land, we prove it was once a ditch belonging to the company, and the right of the company to the strip of land is not barred by lapse of time: *Searby v. Tottenham Railway Company* ('). This is not superfluous land: *Betts v. Great Eastern Railway Company* (').

The plaintiff has not acquired any title under the Statute of Limitations. There have been no acts of adverse possession: *Searby v. Tottenham Railway Company*. The title which the plaintiff sets up can be referred to a lawful title under his lease: *Thomas v. Thomas* (').

Land of this description cannot be treated as superfluous land: *Betts v. Great Eastern Railway Company* ('). There Chief Baron Kelly says that mere nonuser of land for a considerable time does not make the land superfluous: *Hooper v. Bourne* (').

MALINS, V.C.: The questions raised in this case are of the greatest possible importance to the public, and, if the claim could be sustained, would, in my opinion, put the public in a most unfortunate position with regard to the exercise of rights of ownership over the lands adjoining railways.

[After stating the facts of the case his Lordship continued.]

The railway company demanded a rent from the plaintiff because, they said, twelve years have elapsed since these windows *were opened, and if we allow it to go on [627 for eight years longer, an adverse right will be acquired of looking across the railway; we must protect ourselves. And they still claim the right, and continue to demand a rent for the use of those windows looking across the railway. I hope the result of this case will be to teach the railway

(') 3 Taunt., 187.

(') 7 B. & C., 304, 307.

(') 4 A. & E., 176.

(') 8 Ch. D., 235, 247.

(') Law Rep., 5 Eq., 409.

(') 3 Ex. D., 182.

(') 2 K. & J., 79, 83.

(') Law Rep., 8 Ex., 294.

(') 3 Q. B. D., 258, 274.

company that they have no right to claim such rents, for I am of opinion that such rents are utterly illegal and uncalled for, and that the company has no such right to darken windows which overlook their line.

It has not been disputed, that if a person build upon land contiguous to the land of another, and opens windows overlooking that land, the proprietor of the adjoining land may, at any time within twenty years from the opening of the windows looking over his land, put a hoarding before it so as to stop those windows. If a man erects a building looking over my land or my house I have an immediate right to say, This is not an ancient window, I cannot prevent the making of the window, but I will, as close as possible without touching it, put a hoarding so that the window may not look into my garden, or over my land.

If this railway company had been the absolute owners of this property, they might have demanded a rent from Mr. Norton for the privilege of looking over the land, and if he refused to pay them, they would be entitled by law to erect a hoarding as they did; but the question is whether they being a railway company have any such rights, and I am clearly of opinion that they have no such right.

It is necessary to consider what are the rights which railway companies acquire in land which they take for the purpose of constructing their railway. That they acquire the absolute fee simple of the land is not in dispute. I am clearly of opinion that every railway company taking land for the purpose of constructing, maintaining, and using their railway, have the fee simple of all the land which they are authorized to take, and they have a right to exclude all other persons entering upon that land without permission; but they have it in that qualified manner in which land taken for particular purposes is taken.

Now this has been the subject of adjudication, particularly in a case which I decided, and which I should refer to [628] with much *more diffidence than I do if it had not been that everything I decided was affirmed by the Court of Appeal. I refer to the case of *United Land Company v. Great Eastern Railway Company* (¹). There a railway company acquired land and took it, subject to three level crossings. The land at that time on one side of the railway was mud land. It was very improbable that it could ever be applicable for building purposes, but afterwards the plaintiffs, the United Land Company, erected many houses there, and in order to get to the houses it was necessary to use the

(¹) Law Rep., 17 Eq., 158.

railway, and they could only use it as the law had provided them the means of using it by these level crossings. Now, this was very disagreeable to the railway company. They did not like to have so much traffic over their railway, and therefore they raised this contention, that although you may use these level crossings, you can only use them for the purposes to which the land was applied when the right to cross was given. But I had occasion then to go into the question what was the position of the railway company with regard to land acquired for the purpose of the railway, and what was the position of the landowner with regard to that which he had parted with under the compulsory power, and which the railway company had taken. All that I said in that case was affirmed by the Court of Appeal. It appears to me that this case has a most precise bearing upon the question, and in fact decides the question that is now before me. I said in that case⁽¹⁾, "But at the same time that the Legislature throws upon individuals the obligation of parting with their land it protects them as far as possible by obliging the company taking it for the purpose of constructing the railway to make such communication as shall either be agreed upon, or be prescribed by the particular act of Parliament, or be settled by the tribunal appointed for the purpose. Therefore, when one part of an estate is severed from another by a railway, it is always a condition that sufficient communication shall be made either over the railway by a bridge, under the railway by an arch, or across it by a level crossing. But I apprehend that, whatever be the mode of communication, the object is that the rights of the landowner shall be in no way prejudiced, except so far as is required for the actual construction of the railway. He is to have as much enjoyment *and as free use of his land after the railway is [629 constructed as he had before, so far as the exercise of those rights does not interfere with the rights of the railway company, and the rights of the public in running over the lands upon the railway."

Now, that I am right in the rule which I laid down there is shown by the confirmation of it by the Court of Appeal; therefore the law is correctly stated that the owner of the adjoining land has the same rights in the estate which is not taken, that he would have had if the railway had not been constructed, and surely among those rights must be the right of erecting a building with windows in it looking over the railway, just as he would have had the right to erect a building on the same spot looking over his own estate; this

(1) Law Rep., 17 Eq., 165.

part ceasing to be his own estate only for the purpose for which it was acquired, namely, for the purpose of making, constructing, and using the railway.

In the Court of Appeal Lord Justice James says this ('): "I am of opinion that the decree of the Vice-Chancellor in this case is perfectly right. The land belonged to the Crown, and a clause was inserted in an act of Parliament that the railway company were to make such communications for the convenient enjoyment of the land as the Commissioners of Woods and Forests should in their judgment think necessary. It seems to me impossible to say that that clause involves a restriction that the communication is to be only such as they shall think necessary for the convenient enjoyment and occupation of the lands exactly in their present state, and for their present purposes, and for no others. The object was, of course, that the severance of the land by the railroad"—now this is the passage which is very important, and is entirely in accordance with what I said—"the object was, of course, that the severance of the land by the railroad should leave the owner of the land as fully master of the land for all purposes as he was before, so that he did not interfere with the working of the line, exactly as in the usual reservation of minerals." Therefore it leaves the owner of the adjoining land just as he was before, as if the line had not been made, so that he did not interfere with the working of the line. Would any man venture to say that these seven windows looking over the 630] railway in any way *interfered with the working of the line, or could be of the slightest disadvantage to the proprietors of the line? "The object" (he says) "is simply to give to the railway company an uninterrupted right of way for themselves across the land, but not to take away from the owner anything that is not absolutely necessary for the purpose of the railway." Now, is it at all necessary for the purposes of this railway that these windows should be prevented from looking over it? Does it interfere with their working, or interfere with any right whatever which they had? It is impossible for any one to say that it does. *Bostock v. North Staffordshire Railway Company* (*) is a much earlier case, but it completely bears out the decision laid down by the Court of Appeal and myself in the case I have referred to. There the railway company had acquired a reservoir in a beautiful part of Staffordshire, and it was very attractive, and the company thought they could turn it to account, and they did so by advertising, on any great

(') Law Rep., 10 Ch., 589.

(*) 5 De G. & Sm., 584.

holiday, regattas on this great sheet of water. Mrs. Bostock, who was a widow lady living in the neighborhood, had a very beautiful place and grounds close by, and she complained that the result of this was to collect disorderly crowds of people, who broke down her fences and trod down her grass, to her great injury, and she said it was not the right of the railway company, and it was not within the business of a railway company, to collect crowds of people and to permit this kind of disorder. The railway company said, We are owners of this land, the fee simple is conferred upon us, the owner of the fee simple can do as he likes; but Sir James Parker, before whom the case came in the first instance, considered it was a nuisance, and, according to the then practice of the court, gave liberty to Mrs. Bostock to bring such an action as she might be advised. She brought an action, which resulted in the opinion of the Court of Queen's Bench being taken, and three judges against one (that being Mr. Justice Erle) came to the conclusion that, although they were the owners of the railway and reservoir in fee simple, they had only a qualified ownership, and were only entitled to use it for the purposes for which they acquired it, that to use it for this purpose was not within the object of the act, and they were restrained perpetually *from using it for any other purpose [63] than as a railway and canal. Sir John Stuart, who ultimately disposed of the case, says ('), "Indeed, it is the settled doctrine of this court that the rights of ownership in fee conferred on public companies must be restricted and qualified by the terms of the legislative contract. In *Blakemore v. Glamorganshire Canal Company* Lord Eldon said ('): 'When I look upon these acts of Parliament I regard them all in the light of contracts made by the Legislature on behalf of every person interested in anything to be done under them; and I have no hesitation in asserting that unless that principle is applied in construing statutes of this description they become instruments of greater oppression than anything in the whole system of administration under our constitution.'" Then Sir John Stuart adds ('): "It has been said that the purpose of letting pleasure boats for hire is an innocent purpose, and ought not to be objected to. But it is enough that the purpose is not contemplated or authorized by the act of Parliament; for, if it be objectionable to the landowner, if he conceives it to be injurious to him as interfering with his comfort, or even as distaste-

(') 3 Sm. & Giff., 291.

(') 1 My. & K., 162.

(') 5 Sm. & Giff., 292.

ful, he has a right to confine the enjoyment within the essential terms of the contract."

Now this railway company, I think, knowing perfectly well they had only a right to the fee simple of the land for the purpose for which they acquired it, namely, the construction and perpetual working of the railway, set up this sort of defence: It is within a mile of Birmingham; the station accommodation is defective there; we may have to build a station; and because we may have to build a station, therefore we have a right to prevent anybody looking over the railway; if we allow them to acquire an adverse right, it may lead to our being prevented from building this station. Now Mr. Glasse's argument on the subject is that the company have a right to stop the windows of any person who overlooks the railway at a place where the company may want a station, or, to use his own words, No man, by erecting his house on this spot, ought to be allowed to acquire a prescriptive right to prevent the company 632] doing that which they are entitled to do at the spot, namely, erect a station. If that is so, then, according to that, any railway company at any spot on their road, and this railway company at any place between London and Birmingham, if a man erects a house looking over the railway, may immediately come and block up his windows, and say, "We do not know but that hereafter we may have to build a station here." They have no such right, nor (unless authority is cited to the contrary) do I believe that a railway company whose stations are usually found in the deposited plan have a right to go and erect stations wherever they think fit.

I will further illustrate what I have said in reference to this case with regard to the limited power of railway companies. I have pointed out that, though they have an absolute and unqualified fee simple, they can only use the land for the purpose for which they acquired the land, but not, as against the adjoining proprietor, from whom they have taken it, in a manner which will prevent his using the land for any purpose for which he could have used it if this land had not been taken from him. Then, as they have not the unqualified right of using the land, so they could only use it for the purposes for which the capital is raised. They cannot embark in an extraneous trade, as was decided in *Attorney-General v. Great Northern Railway Company* (1), following the decision of *Colman v. South Eastern Railway Company* (2), which decided that the South Eastern Rail-

(1) 1 Dr. & Sm., 154.

(2) 10 Beav., 1.

way Company, having raised capital for the purpose of making a line to Dover or Folkestone, could not embark in or carry on the business of steamboats between those ports and the coast of France. Their property and their purposes are altogether of a limited character. Therefore, on those grounds, being most distinctly and clearly of opinion that the company had no right whatever to interfere with the plaintiff's enjoyment of these windows, I hold that their proceeding is wholly illegal and improper, and I decide that the plaintiff is entitled to a perpetual injunction to prevent the future blocking-up of his windows, and he is also, in my opinion, entitled to damages for the injury he sustained during the period they were blocked up. I am also of opinion that the plaintiff is entitled to compensation *for the damages which he sustained by the smoke [633 nuisance. In the case of *Fenwick v. East London Railway Company* (1), the Master of the Rolls decided that where a thing may be done in one of two ways—one of which is injurious, and one of which is not—the railway company are bound to do the thing in a manner which will not be injurious. These defendants are bound by the act of Parliament—not the Lands Clauses Act, which does not provide for this case, but by their own act of Parliament, which I have looked to—to do as little injury as may be in the construction of their works. And as they had two modes of using their cabin, one by burning a gas fire, and the other by burning a coal fire, and chose to do it in a manner injurious to the plaintiff, he is entitled to be compensated for that wrongful act.

These points are comparatively simple. But the railway company say that the plaintiff is not entitled to the land which he has taken from Sir Charles Adderley up to the boundary fence; but that the railway company are entitled to 4 ft. 6 in. on the other side of their boundary fence. Now this raises a very important question. It appears by the evidence on both sides that the uniform practice of railway companies when they acquire land by their compulsory powers, is first to erect at their extreme boundary rails and posts, so that all within the rails and posts belong to the railway company, and all without belongs to the owners of the adjoining land. But inasmuch as posts and rails are not a perpetual barrier, because they decay and require repairing, and are liable to be broken down, the general practice is, that within a certain distance, which I think may be taken to be four feet within the boundary, they make a

(1) Law Rep., 20 Eq., 544.

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quickset hedge. During that time the boundary posts and rails are still retained; but when that hedge has sufficiently grown up, the posts and rails are either taken away, or allowed to go to decay, or they are disregarded. But in certain cases they not only plant the quickset hedge, which is allowed to grow up, but they make a ditch on the outer side of the quickset, between that and the posts and rails. Then they say the ditch belongs to the railway company. Now I do not think it necessary for me in the present case to give any opinion whether a railway company may or may not be [634] necessarily *owners of such ditch as above described, because, although where it can be conclusively and advantageously done it is the practice outside the quickset hedge to have a ditch, it evidently is not a uniform practice, but depends upon circumstances, and I come to the conclusion from the evidence that on this particular spot it was found not necessary to have a ditch.

This strip of land, therefore, is abandoned, in my opinion, and it is not necessary for me to go into the question whether upon the cases a railway company not using land for ten years abandons it so as to vest it in the owner of the adjoining land; because I am thoroughly of opinion in this case that there never was a ditch, and, if there had been one, their own conduct amounts to a deliberate abandonment of it, in allowing it to be taken possession of by the owner of the adjoining land, who has ploughed it up to the very hedge.

It was the deliberate intention of the railway company, acted on for more than twenty years before this dispute arose, that the hedge should be the natural and visible boundary of their railway. All within that hedge was theirs, and all without it was Sir Charles Adderley's, and he has demised it to the plaintiff.

Therefore on this point also I come to the conclusion that the counter-claim set up by the defendants to have this 4 ft. 6 in. of land has entirely failed, and the counter-claim, therefore, must be dismissed with costs.

Solicitors for plaintiffs: *Clarke, Woodcock & Ryland*, agents for B. Chesshire, Birmingham.

Solicitor for defendants: *R. F. Roberts*.

When a railroad company is authorized to acquire by legal proceedings only the use of lands for the purpose of operating its road, the fee remains in the owner, subject to that use, and on the discontinuance of the use the

owner is entitled to resume possession: *Heard v. Brooklyn*, 60 N. Y., 242, 68 N. Y., 1; *Taylor v. New York*, etc., 38 N. J. Law, 30; *Heath v. Barman*, 40 Barb., 496; *Hasson v. Oil Creek*, 8 Phila. Rep., 556; *Washington*, etc.,

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v. Prospect Park, etc., 68 N. Y., 591, affirming 7 Hun, 655; Alabama, etc., v. Burkett, 42 Alabama, 83.
See Redfield on Railw. (5th ed.), 264-271; 5 Wait's Actions and Defences, 288; Cooley's Const. Law, 4th ed., 697; Belfast, etc., v. Chamberlain, 32 N. Y., 651; Duffee v. Boston, etc., 114 Mass., 37; Taylor v. N. Y., etc., 38 N. J. Law, 28; Kip v. N. Y., etc., 67 N. Y., 227; Yates v. Vande Bogert, 56 N. Y., 1; Boston, etc., v. President, etc., 5 Lans., 464-5; Nicoll v. N. Y., etc., 12 N. Y., 121; Kilmer v. Wilson, 49 Barb., 88; De Varaigne v. Fox, 2 Blatchf., 95; Matter of Boston, etc., 53 N. Y., 574; Brooklyn, etc., v. Armstrong, 45 N. Y., 234; Williams v. N. Y., etc., 16 N. Y., 97; Hatch v. Cincinnati, etc., 18 Ohio St. R., 92.

[9 Chancery Division, 635.]

V.C.M., May 10, 17; July 19, 1878.

***In re BRITISH ALLIANCE ASSURANCE CORPORATION. [635]**

Life Assurance Companies Act, 1870 (33 & 34 Vict. c. 61), s. 21—Prima facie Case—Security for Costs—Winding-up—Demurrer to Petition—Creditors for less than £50—Policy-holders—Allegation of Insolvency—Secretary appointed Liquidator—Practice as to opening Demurrer.

A petition was presented by two policy-holders to wind up compulsorily an insurance company which was being wound up voluntarily, containing charges of false representations and insolvency:

Held, upon a preliminary objection, that where a company was being wound up voluntarily it was unnecessary to consider whether a *prima facie* case was stated, nor to order security for costs under the Assurance Companies Act, 1870:

Held, upon demurrer to the petition, that policy-holders might present a petition under the act of 1870, although their debts did not amount to £50; that a statement—that under the circumstances the company was “admittedly insolvent”—was a sufficient statement that they could not pay their debts; and that the allegations of false representations, and the appointment of the secretary as provisional liquidator, were sufficient to render it just and equitable to make a winding-up order:

Held, also, that upon demurrer to a petition, the counsel for the petitioner must open his case.

[9 Chancery Division, 643.]

V.C.M., Aug. 3, 1878.

***BERKELEY V. STANDARD DISCOUNT COMPANY. [643]**

[1877 B. 504.]

Practice—Interrogatories—Rules of Court, 1875, Order XXXI, rr. 4, 5, 8.

Upon an application for leave to serve interrogatories on a member of a company which is a party to an action, leave will be given where the judge is satisfied that the member sought to be interrogated is likely to be able to give discovery; and the judge is not bound at this stage of the proceedings to consider the propriety of the proposed interrogatories.

[9 Chancery Division, 646.]

V.C.B., May 20, 25, 1878.

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*OLIVANT v. WRIGHT.

[1878 O. 18.]

Estate in Fee Simple—Limitation over on Death "without leaving Issue."

By settlement made in 1817 freehold and leasehold property was conveyed to trustees upon trust to apply the rents and profits in the maintenance and education of the two children of A., deceased, until the youngest of them should attain twenty-one, and from and after that event to pay the rents unto and equally between the two children of A., their heirs, executors, administrators, and assigns respectively, "provided nevertheless that in case either of the children of A. should die without leaving lawful issue," then on trust to pay the share or shares of him, her, or them so dying unto and equally between persons named.

A. had two children, one of whom, B., died intestate and unmarried, the other, C., intestate as to his share, but leaving a daughter, D.:

Held, that the interest taken by D. under the settlement was an interest in fee simple, and that an estate tail was not created by the proviso as to failure of issue.

By a marriage settlement dated the 24th of June, 1817, certain freehold and leasehold and other personal property was conveyed and assigned to trustees as to four-fifths upon the trusts therein mentioned, and as to one-fifth part of the rents, issues, interests, and profits of the said trust, hereditaments, moneys, and premises, upon trust to pay and apply the same in the maintenance, education and support of the two children of the late James Morris, deceased, until the youngest of them should attain the age of twenty-one years, in such shares as the trustees or the survivor of them should think proper; and from and after the youngest of the children of the said James Morris should have attained the said age of twenty-one years should pay the last mentioned fifth part of the said rents, issues, interest, and profits unto and equally between the two children of the said James Morris, their heirs, executors, administrators, and assigns respectively: provided nevertheless and upon further trust in case either of the children of the said James Morris should depart this life without leaving lawful issue, that the trustees should pay the share or shares of him, her, 647] or them so dying of and in the said *rents and profits unto and equally amongst all and every the children of certain persons therein named.

James Morris had two children only, John and Mary.

Mary Morris died in June, 1861, intestate and unmarried.

John Morris died in January, 1820, having had one child

only, namely, Ann, and intestate as regarded his interest under the deed of June, 1817.

In August, 1841, Ann Morris married George Potts, and by him she had two children, John Michael Potts and Mary Ann Potts. Mary Ann Potts died in infancy unmarried, and John Michael Potts was still living. The said George Potts died on the 22d of February, 1845, leaving his said wife him surviving.

After the death of her first husband, Ann Potts, in December, 1847, married Samuel Shenton, and a post-nuptial settlement, dated the 22d of January, 1859, was executed, by which, with her husband Samuel Shenton, she settled upon the trusts therein mentioned all her moiety or share of the one-fifth part of the freehold, leasehold, and personal estate comprised in the settlement of June, 1817, to which, as heiress of John Morris, she was entitled.

Ann Shenton died on the 25th of January, 1867, without having exercised a power of appointment reserved to her under the post-nuptial settlement of January, 1859.

On the 14th of March, 1877, John Michael Potts, in the belief that the interest comprised in the settlement of 1859 was an estate tail, and that from that settlement not having been inrolled as a disentailing assurance the interest had devolved upon him unaffected by the settlement, executed a disentailing assurance (duly inrolled), by which he conveyed the property to Samuel Shenton in fee. Subsequently to this deed Samuel Shenton, dealing with the property as owner in fee, mortgaged it to one Willcock.

The question which now arose upon adjourned summons was, whether the interest which John Morris took in one moiety of the property was an estate tail, which, having devolved upon John Michael Potts, was barred by the disentailing assurance executed by him in March, 1877, by which he purported to convey the property to Samuel Shenton in fee; or whether the interest taken *by John Morris [648 was an estate in fee simple which had descended upon Ann Potts, and was therefore bound by the post-nuptial settlement of 1859.

Sir H. Jackson, Q.C., and *A. T. Watson*, for Samuel Shenton, and persons claiming under him: The limitation in the settlement of June, 1817, by which an estate in fee is given to John Morris, as one of the two children of James Morris, is cut down by the words of limitation over, and he took an estate tail only. Before the Wills Act (1 Vict. c. 26) it was clearly established that a devise of lands to A., and if A. died without leaving issue, then to B., imported

an indefinite failure of issue, and therefore created an estate tail, *Forth v. Chapman* ⁽¹⁾; *Doe v. Duesbury* ⁽²⁾; *Doe v. Ewart* ⁽³⁾; and this settled rule of construction is not altered by the circumstance of the gift comprising leaseholds as well as freeholds: *Bamford v. Lord* ⁽⁴⁾. The rule of construction is the same in deeds and wills: *Bamfield v. Popham* ⁽⁵⁾; *Fisher v. Wigg* ⁽⁶⁾. Although, according to *Idle v. Cook* ⁽⁷⁾, the estate originally limited, in a surrender of copyholds, to the use of A. and B. his wife, for their lives, and of the heirs and assigns of A. and B., and for default of such issue to the right heirs of the surrenderor, was held to be a fee simple—though “in a will such words would make an estate tail; purely upon the intent of the devisor;” that case has not been followed: *Morgan v. Morgan* ⁽⁸⁾.

Hemming, Q.C., and *Hamilton Humphreys*, for persons interested under the post-nuptial settlement of 1859: The forced rule of construction adopted in *Forth v. Chapman*, that the words “die without leaving issue” in a devise of real estate meant an indefinite failure of issue, worked so much injustice and was so much quarrelled with by judges that the Legislature at length interposed, and by the Wills Act (1 Vict. c. 26), s. 29, enacted that “die without issue” 649] means a failure of issue at *the death of the person whose issue are spoken of, unless an intention appear to the contrary. In some of the older cases about the same period as *Forth v. Chapman* ⁽¹⁾, expressions, no doubt, fell from some of the judges (as in *Fisher v. Wigg* ⁽⁶⁾ and *Bamfield v. Popham* ⁽⁵⁾) that the rule in *Forth v. Chapman* applied to deeds as well as to wills. But the judges in subsequent cases were unwilling to extend it, and small circumstances have been relied on to take the case out of the rule: *Porter v. Bradley* ⁽⁹⁾; *Roe v. Jeffrey* ⁽¹⁰⁾. The cases cited do not support the contention that the same rule applies in construing a settlement as in construing a will. In a will the intent of the devisor is to be regarded, whereas a settlement must be construed upon the strict legal meaning of the words used, *Idle v. Cook* ⁽¹¹⁾; and the expressions to the contrary in *Fisher v. Wigg* ⁽¹²⁾, *Bamfield v. Popham* ⁽¹³⁾, are mere *obiter dicta* and opposed to the opinion of Chief

⁽¹⁾ 1 P. Wms., 668

⁽²⁾ 8 M. & W., 514.

⁽³⁾ 7 A. & E., 686.

⁽⁴⁾ 14 C. B., 708.

⁽⁵⁾ 1 P. Wms., 54.

⁽⁶⁾ 1 P. Wms., 14.

⁽⁷⁾ 1 P. Wms., 70.

⁽⁸⁾ Law Rep., 10 Eq., 99.

⁽⁹⁾ 3 T. R., 143, 146.

⁽¹⁰⁾ 7 T. R., 589.

⁽¹¹⁾ 1 P. Wms., 70, 75.

⁽¹²⁾ 1 P. Wms., 14, 15.

⁽¹³⁾ 1 P. Wms., 54, 57, and note.

Justice Holt. *Morgan v. Morgan* ⁽¹⁾ was decided upon different words, the limitation over there being on death "without issue," whereas here the limitation over is on death "without leaving issue." We submit that the estate in fee which was given to John Morris as one of the children of James Morris, cannot be cut down to an estate tail by ambiguous words: Cruise's Dig. ⁽²⁾.

Sir H. Jackson, in reply: The same construction will be applied in a deed as in a will; and though judges in former times stood out stiffly against the doctrine, there is no doubt that where conveyancing words have been used in a deed together with popular words, you may look at the whole intention of the deed, so that it be not inconsistent with the rules of law. Both before and since the Wills Act "dying without leaving issue" is a convertible term with "dying without issue," so that *Morgan v. Morgan* governs this case, and although "dying without issue" now implies a failure of issue at the death of the person whose issue are spoken of, these words were in 1817 strictly construed as implying an indefinite failure of issue.

*BAOON, V.C.: No doubt the distinction between [650 a deed and a will is a very palpable one. A deed is a contract by which the owner of property gives a certain destination to it then and thenceforth forever, and he parts with all his power over it. A will is an instrument which is not to take effect till the death of the testator. The court has gone great lengths in endeavoring to ascertain what was the intention of the testator in construing his will. In construing a deed, you must also ascertain what was the intention of the party. The intention here is perfectly obvious and distinct, and I do not believe that any man alive, lawyer or layman, could read this instrument and doubt what the meaning of the words there contained ought to be held to be. A man having to dispose of his property divides it into fifths; as to one fifth, he leaves it to the children of a man named, and they being children at the time, he provides for the application of the income to their maintenance and education, and upon their attaining twenty-one he gives it them absolutely. The deed is then complete, and has accomplished that entire object. Then it is suggested, or it occurs to somebody, that these children, now infants, whose maintenance is provided for, may die without leaving issue; and in that event he gives it over to somebody else. Then the contention before me is that I must read the intention of the settlor to be cut down by means of words contained

⁽¹⁾ Law Rep., 10 Eq., 99.

⁽²⁾ Vol. iv, p. 281, pl. 19.

in the proviso that absolute interest which he has given in the preceding trust declared of the one-fifth. There is no principle of construction which would justify me in doing so. There is no authority, and there has been no case cited to me which would at all incline me to do so. The authority of *Forth v. Chapman* (1) need not be adverted to. This is not a will—it is enough to dispose of that part of the case by saying that. But the other cases in which there have been under the consideration of the court deeds, or something equivalent to deeds, do not seem to me to favor the construction that this testator, who gave an absolute interest to two children, providing for their maintenance during their minority, and giving them the fee simple when they attained twenty-one years—meant in the case mentioned in the proviso to do more than to provide for the 651] *circumstance of the absolute gift of the fee simple made by him to the two children becoming abortive and inoperative because they or either of them might die in their infancy. That is the way I read the deed. In my opinion, that is the only construction to be properly put on it. The only difficulty I have among all the cases which have been cited, is that presented by the case of *Morgan v. Morgan* (2). But at the same time I cannot disregard the case of *Idle v. Cook* (3), where the decision plainly was, that, there being a gift to the husband and wife for their lives and afterwards to their issue, and a gift over in default of such issue, that had not the effect of cutting down the absolute unqualified fee simple which was given by the previous trust contained in the surrender. I do not find that that case engaged the attention of Lord Romilly in the case of *Morgan v. Morgan*. The only observation I can find in it is “notwithstanding *Idle v. Cook*.” That, in my opinion, can be answered and disposed of by recollecting that the words are different, that the words in this case are “without leaving issue,” and in *Morgan v. Morgan* they were “without issue.”

Adopting all that has been said about these cases—keeping in my mind the distinction between a will and a deed, which is that which I have already expressed, the intention being, notwithstanding, the governing principle in both cases—I read in this deed an intention, expressed and executed, that an interest in fee simple shall be given to each of these children as soon as they shall respectively attain the age of twenty-one years, and if before that time—I do not mean that there are any such words in the deed, but as

(1) 1 P. Wms., 663.

(2) Law Rep., 10 Eq., 99.

(3) 1 P. Wms., 70, 75.

I construe the deed it means this—if before that time the provision he had made for these children should cease to be effectual, he gives it over to somebody else. That is the plain meaning of the deed. That, in my opinion, is the legal construction of the deed, and I think the only child of John Morris ultimately took on her father's death intestate an estate in fee simple, and that that is bound by the settlement of 1859, afterwards executed, and that no estate tail was created.

Solicitors : *Miller & Wiggins ; Johnson & Weatherall.*

[9 Chancery Division, 652.]

V.C.H., Jan. 12, 18, 1878.

**In re FARNCOMBE'S TRUSTS.*

[652]

Appointment—Excessive Exercise—Contingent Class—Objects—Non-Objects—Ascertainment at Future Period.

The donee of a power to appoint a fund in favor of her own issue, "such issue to be born before any such appointment," by deed, after reciting the power and her desire to exercise it, and the state of her family, appointed the fund to her daughter for life, and after the daughter's death to the daughter's children in equal shares on their respectively attaining twenty-one, but if any of such children should die under twenty-one leaving issue, the share of the child so dying was to go to such issue, to vest at twenty-one.

At the date of the appointment the daughter had three children living (including one *en ventre sa mère*), and she had three born afterwards. One of the children had attained twenty-one, and the rest were minors :

Held, first, that issue in existence at the date of the deed of appointment were the only objects of the power. Secondly, that upon the construction of the deed the intention of the appointor was to include non-objects, i.e., issue born after that date. Thirdly, that the appointment was not thereby bad *in toto*; but that, fourthly, the share of each object would be determined by the total number of objects and non-objects who should fall within the class in whose favor the appointment purported to be made.

Under the circumstances, one-sixth of the fund in court directed to be at once paid out to the child who had attained twenty-one, and the remainder to remain in court, and the dividends thereon to be accumulated.

PETITION. Philadelphia Farncombe the elder, by her will, dated in January, 1825, devised certain lands in trust for sale, and directed the trustees to invest the net proceeds thereof and to stand possessed of the trust funds to be produced thereby upon trust to pay the income to her granddaughter, Philadelphia Tanner, during her life, and after her death to hold the trust fund "in trust for the child, grandchild, or other issue, or all or any one or more of the children, grandchildren, or other issue of the said P. Tanner, or of any of the testatrix's daughters, Mary Hodson, Sarah Hardwick, and Harriet Gale, such grandchildren and

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issue respectively to be born before any such appointment as thereafter mentioned should be made to them respectively, in such manner and form, and if more than one in such parts, shares, and proportions, and at such times, with such limitations over or substituted in favor of all or 653] any one or more of *the other of the said children, grandchildren, and issue respectively, and either by way of legacy, portion, present or remote interest, or otherwise, and to vest and be payable at such time or times, and upon such contingencies, and subject to such directions and regulations for maintenance, education, and advancement in life, and such conditions and restrictions as the said Philadelphia Tanner," notwithstanding coverture, should by deed or will appoint; and in default of and subject to any such appointment, then on trust for the issue of the said P. Tanner who should be living at her death, if more than one as tenants in common, and the executors, administrators and assigns of the same respectively, and so that such issue, if more than one, might take *per stirpes* and not *per capita*, and that no person should take under the description of issue unless the same issue should have died in the lifetime of the said P. Tanner, the shares of males to be payable at twenty-one, and of females at twenty-one or marriage. And in case there should be no issue of the said P. Tanner at her death, then upon the trusts therein mentioned. And the testatrix thereby gave the residue of her personal estate to the trustees upon trust to convert, invest, and pay the income to her said three daughters and granddaughters equally between them during their respective lives, with trusts upon the death of each of her said daughters and granddaughters respectively in favor of her children, grandchildren, or other issue as such daughter or granddaughter should appoint, in terms similar to the aforesaid powers limited to the said P. Tanner with respect to the proceeds of the real estate.

Philadelphia Farncombe the elder died on the 3d of January, 1832.

Philadelphia Tanner, the donee of the power, had three children, Philadelphia, born in 1830, who intermarried with William Farncombe, and two other daughters, born respectively in February, 1832, and February, 1839. By deed dated the 29th of December, 1859, Mrs. Tanner, after reciting the said will, that she had three children as aforesaid, and that she was desirous of executing the powers of appointment given to her by the said will, in exercise of the said powers appointed that the whole trust premises over

which she had power of appointment should after her decease be *held as to one-third part thereof upon trust [654 for her daughter, Philadelphia Farncombe, for life, and after her decease upon trust "to divide the same between the children of the said Philadelphia Farncombe in equal shares as tenants in common on their respectively attaining the age of twenty-one years, and their respective executors, administrators and assigns. But if any of such children should die under the age of twenty-one years leaving issue, then the share of such of them so dying should go to such issue to vest in such issue on their respectively attaining the age of twenty-one years; and if there should be but one child of the said Philadelphia Farncombe who should attain the age of twenty-one, then for such one child absolutely. But in case the said Philadelphia Farncombe should die without leaving any child, children, or issue who should take a vested share in the said trust premises," then the aforesaid third part of the fund was to go in moieties upon the trusts therein declared concerning the other two-thirds; which were trusts in favor of Mrs. Tanner's other two daughters and their respective children; one of those daughters being unmarried, and the other having had no children.

Philadelphia Farncombe the younger had six children, of whom two were born before, and one was *en ventre sa mère* at the date of the appointment, and the other three were born subsequently. She died in April, 1874; one-third of the funds subject to the trusts of the will of Philadelphia Farncombe the elder was afterwards paid into court by the trustees of the will and carried to the account of "the share appointed to Philadelphia Farncombe for life;" and a petition was now presented by parties claiming as in default of appointment for distribution of the fund in court accordingly.

One of the children of P. Farncombe the younger had attained the age of twenty-one years in June, 1877, and the others were still under that age.

Dickinson, Q.C., and *Hadley*, for the petitioners: Children not born at the date of the deed purporting to exercise the power of appointment are not within the power. The appointment is accordingly void, and altogether fails, and the fund *must be distributed as in default of [655 appointment: *Alexander v. Alexander*(¹); *In re Kerr's Trusts*(²); *Humphrey v. Tayleur*(³).

Morgan, Q.C., and *Langley*, for the three younger chil-

(¹) 2 Ves. Sen., 640.

(²) 4 Ch. D., 600.

(³) 1 Amb., 136.

dren of P. Farncombe the younger: These children, although begotten and born after the date of the appointment, are within the power because the appointment was made to them at twenty-one, and, there being no appointment to them until they attain twenty-one, it is enough if they are in existence at the time when the appointment to them is made. Until they attain twenty-one the appointment is suspended. If no child attains twenty-one, there is no appointment; if one child attains twenty-one, then that child takes: *Packer v. Scott*⁽¹⁾; *Andrews v. Partington*⁽²⁾. But if this is not so, then the whole appointment is void, for where there is a general gift to a class, some members of which are objects of the power and some are strangers, you cannot divide that gift so as to make it good as to some of the appointees and bad as to the others; and if void in part it is void *in toto*. *Routledge v. Dorrill*⁽³⁾; *Harvey v. Stracey*⁽⁴⁾; *In re Brown's Trust*⁽⁵⁾.

HALL, V.C., referred to *Evers v. Challis*⁽⁶⁾ and *Mony-penny v. Dering*⁽⁷⁾.

W. Pearson, Q.C., and Everitt, for the three elder children: This appointment is by deed, reciting the power and the state of the appointor's family. Upon the true construction of the deed those children only who were in existence at the date of the appointment (amongst whom must be included the child then *en ventre sa mère*) were intended, and those children take the whole: *Trower v. Butts*⁽⁸⁾.

Renshaw, for other parties.

656] *HALL, V.C.: The first question is, who are the objects of the power? This part of the case is in a very cloudy state, and the construction has been very much left to the court; but it appears to me that no person was an object who was not born before the making of the appointment, that is, before the execution of the deed. It is plain that the appointees of the interest first given must be so born; but it was, no doubt, worthy of consideration, whether an interest after a life interest might be given to persons unborn. I think not. The power provides for appointments with limitations over in favor of "the said children, grandchildren, and issue." Those words appear to me to refer to issue born before the appointment. If nothing had been given to the parents, then, beyond dispute, nothing could have been given directly to unborn issue; and it is not a rea-

(1) 33 Beav., 511.

(2) 3 Bro. C. C., 401.

(3) 2 Ves., 357.

(4) 1 Drew., 73, 117.

(5) Law Rep., 1 Eq., 74.

(6) 7 H. L. C., 531.

(7) 2 D. M. & G., 145, 180.

(8) 1 S. & S., 171.

sonable construction, that merely making an appointment to parents would let in as appointees issue who would otherwise not be objects. The words of the power, I think, include as part of the description of the objects, whether to take *in presenti* or in remainder, that they shall be living at the time of appointment. It follows that the only persons capable of taking under an appointment of this particular share were the three children of Philadelphia Farncombe, who were in existence at the date of the deed of appointment.

As regards the appointment, it was contended by Mr. Pearson that, having regard to the facts, the deed must be construed as in favor of these three children only. That construction would confine the appointment to persons who were objects. His argument was, that the deed recites the power, that it may be assumed that the grandmother knew what children her daughter had, that she states her desire to execute the recited power: and that, therefore, it is reasonable to limit the appointment, if possible, to objects. The appointment in terms directs a division between the children on attaining twenty-one; but I was asked to read that as "the children now living," because these were the only objects. In the first place, however, that construction would cut down the ordinary meaning of the words. I cannot but take the words according to their ordinary acceptance, notwithstanding that the appointment thus becomes one not authorized by the power. And *further, it [657 is to be observed, that throughout the instrument the lady was not taking a correct view of her power. She provides for the event of children dying under twenty-one leaving issue, which shows that she was not meaning to keep within the true limits of the power. Again, she provides for the fund going over in moieties like the other two-thirds, one of which at least was given to children of whom not one was actually born or *en ventre sa mère*. All the limitations, therefore, being framed upon the same principle, I must give to the words in question their ordinary meaning, and hold that the appointment in terms includes children whether objects or not.

Under these circumstances, the question arises, what is the effect of the appointment? There appears to be no question of remoteness. On the death of the tenant for life, the minimum of the share of each child is ascertained. The appointment is in such a form that the mode of distribution is not to be ascertained till they attain twenty-one; but if there should be only one who attains twenty-one, I do not see why that one, being an object, should not take the whole.

So with two or three being objects; but so long as any remain under twenty-one there is a suspense as to the share or shares appointed. There is no illegality in that. But the appointment being to six, you cannot let objects who attain twenty-one take more than the appointor meant them to take. The residue must go as in default of appointment. As to authority, I think the law is beyond doubt. The matter is elaborately worked out by Vice-Chancellor Kindersley in *Harvey v. Stracey* (¹), a case which was similar to this, except as to the attaining twenty-one; there the fund was given immediately. The Vice-Chancellor, however, works out the principle in his judgment (²), and puts cases which show how he would deal with the present case. Therefore, upon that case and the case therein referred to, of *Sadler v. Pratt* (³), it seems to me that authority as well as principle show that effect is to be given to this appointment in favor of such of the three then living children as attain twenty-one, the other shares appointed being liable, if the appointees thereof die under twenty-one to go to increase in part or 658] *wholly, according to circumstances, the shares well appointed. Accordingly, at present none of the three can take more than one-sixth; and that proportion will be paid to the one of Mr. Pearson's clients who has attained twenty-one. The other five-sixths will remain standing to the present account, an accumulation being directed of the interest until further order. The costs of all parties will be out of the fund as between solicitor and client.

Solicitors for petitioners: *Gregory, Rowcliffes & Rawle.*

Solicitors for other parties: *Clarke & Calkin*, agents for Clarke & Howlett, Brighton.

(¹) 1 Drew., 78, 117.

(²) 1 Drew., 131.

(³) 5 Sim., 632.

[9 Chancery Division, 658.]

V.C.H., May 10, 13, 22, 1878.

WINGFIELD V. WINGFIELD.

[1877 W. 426.]

Will—Construction—Blended Realty and Personally—Gift of, in Remainder—“Brothers and Sisters then Living, or their Heirs”—Heir-at-Law—Next of Kin—Period of Ascertainment.

A testatrix by her will gave all her personal and also all her real property to trustees in trust for payment of her debts and legacies, and subject thereto between her five sisters, *nominatim*, and the survivor of them, in equal shares during their lives and spinsterhood, “and upon the death or marriage of all her said sisters,” she

willed that "her said property should be divided in equal proportions between her brothers and sisters then living or their heirs."

The testatrix had six brothers and six sisters. Of these, one brother died before the testatrix was born, one sister died in the lifetime of the testatrix, but before the date of the will; two brothers and one sister died in her lifetime and after the date of the will, and the rest survived her, the last survivor of them being a sister:

Held, first, that the word "or" in the gift in remainder could not be read "and," and therefore that there was no intestacy:

Secondly, that as to the personal estate comprised in the gift, the word "heirs" must be construed statutory next of kin (which would include widows), and as to the real estate, heirs-at-law:

Thirdly, that such heirs-at-law and statutory next of kin of the brothers and sisters of the testatrix were to be respectively ascertained, as to the brothers and sisters who predeceased the testatrix, at the death of the testatrix, and as to those who survived her, at their respective deaths:

Fourthly, that the heir-at-law and next of kin of the brother who died before the testatrix was born were not entitled to share: and,

Fifthly, that the heir-at-law and next of kin of the sister who died before the *date of the will, as well as the heir-at-law and next of kin of the two [359] brothers and sister who died in the lifetime of the testatrix and after the date of the will, were so entitled.

De Beauvoir v. De Beauvoir (1) distinguished.

ELIZABETH EMILY WINGFIELD, who died in July, 1860, made her will, dated the 5th of April, 1836, as follows:

"I give and bequeath all my personal property of every description and also all my real property, in trust to my brothers Thomas Henry Wingfield and Charles William Wingfield, for the purposes hereinafter declared (that is to say), that they the said Thomas Henry Wingfield and Charles William Wingfield shall pay thereout my just debts, funeral and testamentary expenses, and the following legacies: I give and bequeath unto my said brothers Thomas Henry Wingfield and Charles William Wingfield the sum of £100 each; and subject thereto I give and bequeath all my personal and real property as aforesaid, and all interest and profit arising therefrom, between my sisters Mary Anne Wingfield, Sarah Wingfield, Caroline Wingfield, Henrietta Wingfield, and Louisa Wingfield, in equal shares and proportions for and during their natural lives if they shall so long continue single and unmarried, and in case either of them shall die or marry, I will and direct that my said property devolve to the survivors or survivor as long as they remain single and unmarried, and upon the death or marriage of all my said sisters I will and direct that my said property be divided in equal proportions or shares between my brothers and sisters then living, or their heirs."

The estate of the testatrix comprised both realty and personalty, and she had had six brothers, viz., John the elder,

(1) 8 H. L. C., 524.

John the younger, Edward, Thomas, Charles, and George; and also six sisters, viz., Mary Anne, Sarah, Caroline, Ellen, Henrietta, and Louisa. Of these John the elder died in infancy before the birth of the testatrix; Ellen died in the lifetime of the testatrix, and before the date of the will; Edward, Thomas, and Louisa died in the lifetime of the testatrix and after the date of the will; and all the others died after the death of the testatrix, the last survivor of them being Henrietta, who died a spinster in July, 1877.

660] *The plaintiff in this action, John Harry Lee Wingfield, was the eldest son of John Wingfield the younger, and was heir-at-law and customary heir of all the testatrix's brothers and sisters, except George, whose heir-at-law and customary heir was his son George Arthur, one of the defendants. The other defendants were the various legal personal representatives and next of kin, or legal personal representatives of next of kin of the brothers and sisters of the testatrix; and the trustees and executors of the will; and the object of the action was to have the rights of all parties interested in the real and personal estate of the testatrix ascertained and declared by the court.

W. Pearson, Q.C., and Alfred Bailey, for the plaintiff: It was the manifest intention of the testatrix to provide for her sisters *dum solæ*, and subject thereto to provide for all her brothers and sisters, and their heirs; and the gift is a good gift to the brothers and sisters of the testatrix who were living at the death of the surviving sister, or, by way of substitution, the heirs of such of them as were then dead. The heirs of the brothers and sisters who died before the testatrix are entitled, as well as the heirs of those who survived her, and the heirs of the former must be ascertained as at the death of the testatrix, and of the latter at the time of their respective deaths: *King v. Cleveland* (1); *In re Philips' Will* (2); *Grey v. Pearson* (3).

[HALL, V.C.: The marginal note in *King v. Cleveland* leaves out the words "share and share alike," on which the question turned.]

Secondly, the word "or" must be read in its ordinary sense, and not as "and," and all the brothers and sisters being dead, the persons described as "heirs" take on an alternative form of original gift as *personæ designatæ*.

Thirdly, as to the meaning of the word "heirs." Where the gift is of real estate only, the word clearly has its ordi-

(1) 4 De G. & J., 477.

(2) Law Rep., 7 Eq., 151.

(3) 6 H. L. C., 61.

meaning. Where the gift is of personal estate only, it may mean statutory next of kin; and where there is a blended fund *comprising both real and personal estate, [661 then, all being given in one mass, there is no ground for severing the meaning of the word, or preferring one sort of heir to another; and as the heir-at-law must take the realty, and the same person is to take both, he takes both the realty and the personalty: *De Beauvoir v. De Beauvoir* ('); *Southgate v. Clinch* ('); Jarman on Wills (').

There were here ten brothers and sisters living at the date of the will. If, therefore, the heirs of these only are held entitled, we take nine-tenths; but if the heirs of those who died before the date of the will are included, we take eleven-twelfths of the whole property.

Norman Pearson, for the defendant George Arthur Wingfield, the heir-at-law of the testatrix's brother, George Wingfield, who survived the testatrix: This is a gift to a class followed by a substitutional gift to the heirs of such members of the class as were dead at the time of distribution, and the heirs of the brothers and sisters who died before the testatrix cannot take anything under the gift: *Ioe v. King* ('); *In re Sibley's Trusts* ('). All the cases in conflict with this contention contain words which would include members of the original class who were dead at the date of the will. In *Loring v. Thomas* (') the words "shall die" were held equivalent to "shall be dead;" and in *Bebb v. Beckwith* (') the expression "in case of death" was held to mean "in case of death at any time."

Morgan, Q.C., and *W. B. Heath*, for next of kin or legal personal representatives of next of kin of several of the brothers and sisters who survived the testatrix: The word "or" must be read as "and," and accordingly there is an intestacy: *Read v. Snell* ('); *Lachlan v. Reynolds* ('); *Re Walton's Estate* (').

Secondly. Where there is a substantive gift to the "heir" of a *person, there the heir takes as *persona designata*; but where the gift is to the heir by way of substitution, the word "heir" must be construed to mean the person who would legally succeed to the property according to its nature or quality: *Mounsey v. Blamire* ('); *Hamilton v.*

(') 3 H. L. C., 524.

(') 27 L. J. (Ch.), 651.

(') 3d ed., vol. ii, p. 72.

(') 16 Beav., 46.

(') 5 Ch. D., 494.

(') 1 Dr. & Sm., 497.

(') 2 Beav., 308.

(') 2 Atk., 642.

(') 9 Hare, 796.

(') 8 D. M. & G., 173.

(') 4 Russ., 384.

Mills ('); *Finlason v. Tatlock* ('); *Doody v. Higgins* ('); *Gittings v. M' Dermott* (').

And the rule will apply although the property consists of a blended fund of realty and personalty. *Low v. Smith* ('), where the words were "legal heirs," is a direct authority on this point; and *De Beauvoir v. De Beauvoir* (') is not inconsistent, for the gift in that case was an original gift, and it appears from the will that the testator's intention was to found a family estate; that all the property, both real and personal, should have the character of real estate, and that it should go to the "right heirs" as *personæ designatæ*. *De Beauvoir v. De Beauvoir*, and the authorities relied upon by Lord St. Leonards in that case, were not cases where the heirs took by substitution or to prevent a lapse, but where the heir-at-law took as *persona designata*; and in *De Beauvoir v. De Beauvoir*, *Gittings v. M' Dermott* was distinctly recognized as an authority. It is true that in several cases the heir-at-law has been held to take as *persona designata* a mixed property, but it has never been decided that the mere circumstance of realty being blended with personalty is sufficient to entitle the heir-at-law to take the whole. No doubt there is a *dictum* of Lord Eldon's in *Wright v. Atkyns* ('), as to the difficulty of giving different meanings to the same words in the same place, but there are also *dicta* on the other side in the cases before mentioned.

The word "heirs," then, in this case must, with respect to the personalty, be read as "statutory next of kin."

[They also referred to Hawkins on Wills (').]

Willis Bund, for persons in the same interest, referred to *In re Steevens' Trusts* (').

663] **A. Comyns*, for the widow of C. W. Wingfield, a deceased brother of the testatrix, who survived her: There is an intestacy, and the next of kin are entitled, because this is a gift to a class, with a substitutional gift to children, and the children cannot take unless the parent could likewise take: *Coulthurst v. Carter* ('); *Waugh v. Waugh* ('); *Christopherson v. Naylor* ('); *In re Porter's Trust* ('). If there be not an intestacy then the next of kin take the personalty

(') 29 Beav., 193.

(') Law Rep., 9 Eq., 258.

(') 9 Hare, App. xxxii; 2 K. & J., 729.

(') 2 My. & K., 69.

(') 25 L. J. (Ch.), 503; 2 Jur. (N.S.), 344.

(') 3 H. L. C., 524.

(') Coop. G., 111, 123.

(') Page 91.

(') Law Rep., 15 Eq., 110.

(') 15 Beav., 421.

(') 2 My. & K., 41.

(') 1 Mer., 320.

(') 4 K. & J., 188.

under the word "heirs": *White v. Briggs* (') and *Elton v. Eason* (').

Merivale, for other next of kin: The word "heirs" may be construed differently as regards realty and personalty, although both properties are comprised in the same gift: *Herrick v. Franklin* (').

Wingfield, for the trustees.

W. Pearson, in reply, referred to *Re Rootes* ('); *Gompertz v. Gompertz* ('); *Forth v. Chapman* ('); *Gwynne v. Mud-dock* (').

HALL, V.C., referred to *Congreve v. Palmer* (').

May 22. *HALL*, V.C.: Several questions have to be determined by me in this case. It has been contended that the words "or their heirs" are to be read "and their heirs." Three cases were cited in support of this. The first was *Read v. Snell* ('), in which Lord Hardwicke said, "It was admitted by the defendant's counsel that the word 'or' may be construed 'and,' as suppose a devise of land to A. or his heirs, it would be a devise in fee." In the supposed case there were no words to pass the fee, and this might perhaps have been considered a sufficient ground for such reading. That is not the case here, *for although the will was [664 made before the late Wills Act, the words of devise are sufficient to pass the fee without such an altered reading; and it is clear that the word "property" was intended to pass the fee in the devise to the trustees. Another of the cases was *Lachlan v. Reynolds* ('). In that case "or" was read "and," but this reading was warranted by the previous and subsequent parts of the will, particularly the clause where the words "and their heirs" occurred. The third of the cases was *In re Walton's Estate* ('). In that case the words "and assigns" occurred. Several of the cases cited in the argument on the other questions which I have to determine are authorities against the alteration of the word "or" into "and."

The next question I shall consider is, whether this case is, as has been contended, governed by *De Beauvoir v. De Beauvoir* ('). In *Low v. Smith* ('), Vice-Chancellor Kinders-

(1) 2 Ph., 583, 590.

(2) 19 Ves., 73.

(3) Law Rep., 6 Eq., 593.

(4) 1 Dr. & Sm., 228.

(5) 2 Ph., 107.

(6) 1 P. Wms., 663.

(7) 14 Ves., 488.

(8) 16 Beav., 435.

(9) 2 Atk., 645.

(10) 9 Haro., 796.

(11) 8 D. M. & G., 173.

(12) 3 H. L. C., 524.

(13) 25 L. J. (Ch.), 502; 2 Jur. (N.S.), 344.

ley says of that case⁽¹⁾: "It was there held that the power to trustees to convert personalty into realty did not operate as an absolute conversion; but, secondly, that on the face of the will it was the intention of the testator to make the two funds a blended property, and to give them the character of real estate, and to make both properties go together, and to give both to persons expressly designated, and that such intention did not cease with the failure of issue male under the limitations, so as to make the real estate afterwards go in one way and the personal estate in another." That seems to me to be a correct exposition of that case, and having read the whole of the judgment of Lord St. Leonards in *De Beauvoir v. De Beauvoir*, I do not consider that he lays down expressly or otherwise, that in all cases where there is a trust of real and personal estate for "right heirs" the property, real and personal, is to go to the heir-at-law taking real estate. In *Wright v. Atkyns*⁽²⁾ Lord Eldon said it was very difficult to give a divided construction of the word "family." Lord St. Leonards says, referring to that case in *De Beauvoir v. De Beauvoir*⁽³⁾: "In that 665] case, therefore, which was a simple *devise of all the property 'to my family,' Lord Eldon thought it was very difficult to collect a different intention and to attribute to the testator an intent to give the real estate one way and the personal estate another." Lord Eldon's observation in *Wright v. Atkyns*⁽⁴⁾ was commented upon by Lord Cottenham in *White v. Briggs*⁽⁵⁾, and by Vice-Chancellor Giffard in *Herrick v. Franklin*⁽⁶⁾. Each of those learned judges did not feel the same difficulty as Lord Eldon seems to have felt. In *Elton v. Eason*⁽⁷⁾ Sir William Grant said: "There is no reason why the same words may not be differently construed when they apply to different descriptions of property governed by different rules." It seems to me that cases like *Wright v. Atkyns* and *De Beauvoir v. De Beauvoir*⁽⁸⁾, and the other similar cases, are, in reference to this difficulty, distinguishable from the case before the court. Where, as in the present case, the trust or limitation is such that the heirs take as substitutes for, and as representing persons who would have taken if living, but who never could themselves take, the words "then living" excluding such persons from the class first described, the trust or limitation contains within itself that

(1) 25 L. J. (Ch.), 504.

(2) 17 Ves., 255; 19 Ves., 299; Coop.

G., 111; T. & R., 143.

(3) 8 H. L. C., 559.

(4) 2 Ph., 583.

(5) Law Rep., 6 Eq., 593.

(6) 19 Ves., 77.

(7) 3 H. L. C., 524.

which requires that the property shall go to heirs upon whom the property would devolve by law, and that although such heirs do not actually take by legal succession. Consistently with this, although substitutes or representatives take, the words "or their heirs" are not substitutional, so as to render applicable the cases in which the question has been whether the gift was substitutional as distinguished from original: as appears from *Martin v. Holgate* (¹) and cases there cited, and many other cases where that question came under consideration. The word "or" in the gift is, as observed by Sir George Turner in *King v. Cleveland* (²), put in opposition to the words "then living." It was contended that *Low v. Smith* (³) was a gift of real and personal estate. The reports are not sufficiently full to show that that case is directly applicable to the present. I think that that case may have been, and probably was, one in which the realty *was by the will converted into person- [666] alty, or that the two properties were not given together except in the disposition which had to be construed. I therefore rest my decision on the ground I have already mentioned, viz., that the proper construction of the words is that of heirs as regards the characters of the properties comprised in the gift, such reading involving a division of the properties between the heirs of realty taking the real estate and the heirs of personalty taking the personalty. The authorities are numerous that, as to personalty, the next of kin, according to the Statute of Distributions (including widows), are the persons to take when there is a trust of personalty only for "heirs." Many of those authorities were cited during the argument.

The next question to be considered is, when are the next of kin to be ascertained? As to this it is clear, upon the authorities, that as to any who predeceased the testatrix they must be ascertained at her death, and as to those who survived her, at the respective deaths of the persons dying.

The next question is, whether the heirs and next of kin respectively of a brother and sister of the testatrix who were dead at the date of the will, take? The brother was dead before the testatrix was born, and I think that one is not included in the class of "my brothers and sisters." As to the sister, I think that the heir and next of kin respectively do take: according to *In re Philips' Will* (⁴), which, if it is in conflict with the earlier case of *Congreve v.*

(¹) Law Rep., 1 H. L., 175.

(²) 25 L. J. (Ch.), 502; 2 Jur. (N.S.),

(³) 4 De G. & J., 477.

344.

(⁴) Law Rep., 7 Eq., 151.

1878

In re Ord. Dickinson v. Dickinson.

V.C.H.

Palmer (¹), I think to be more in accordance with the current of authority.

Solicitor: *Joseph Mote*, agent for John Torkington, Stamford.

(¹) 16 Beav., 435.

In the following cases the words "heirs and next of kin" were held to include the testator's widow: *Luce v. Dunham*, 7 Hun, 202.

In the following, "next of kin" did not: *Murdock v. Ward*, 67 N. Y., 887, reversing 18 Hun, 9, and distinguishing *Merchants, etc., v. Hinman*, 15 How. Pr., 182; *Knickerbocker v. Seymour*, 46 Barb., 198; and *Dewey v. Goodenough*, 56 Barb., 54.

In the following the widow was held not to be included in the word "heirs:"

Estate of Woodworth, 1 Oldright, Nova Scotia, 101; *Unfried v. Hebner*, 63 Ind., 68; *Jacobs v. Jacobs*, 42 Iowa, 600; *Gauch v. St. Louis, etc.*, 88 Ills., 251; *Jones v. Lloyd*, 33 Ohio St. R., 572.

In the following, to include her: *Eisman v. Poindexter*, 52 Ind., 402; *Eby's Appeal*, 84 Penn. St., 241.

As to who are not included under the term "descendants:" *Hamlin v. Osgood*, 1 Redfield's Surr. Rep., 409.

[9 Chancery Division, 667.]

V.C.H., June 20, 1878.

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*In re ORD, Deceased.

DICKINSON V. DICKINSON.

[1876 O. 42.]

Will—Bequest of Leaseholds at C.—After-acquired Leaseholds at C.—Wills Act, s. 24—Contrary Intention—Bequest of Share of Rents and Profits to Son, whether for Life or a Longer Period.

J. O., who died in 1860, by will made in 1859 gave to trustees all his estates of which he should be seised or possessed at the time of his decease, upon trusts as to the residue of his personal estate to convert into money, pay debts (except such mortgage debt as should be charged on the leasehold estate at C. [occupied as a farm] bequeathed to his son), invest and pay the income, and the rents of the estates to his wife for life or widowhood, she maintaining his children, provided that if his son should attain the age of twenty-one before he should become entitled in possession to the estate at C., he should be paid by the trustees, as his share of the income, £40 annually from his majority to the death or marriage of his wife, and after either event they were to assign his leasehold property at C. (charged with the payment of mortgage debts charged thereon, and also with an annuity of £9 charged thereon) unto his son. The wife was to be allowed to occupy the farm at C. until her death or marriage, for the benefit of herself and children. J. O. was, at the date of his will, possessed of two leaseholds at C., one charged with an annuity and the other with a mortgage debt, and he was the owner of real estate at B. In October, 1859, he purchased another leasehold adjoining his leaseholds at C., and in November, 1859, he sold his estate at B. and received the purchase-money, but died suddenly before the completion of the purchase of the leasehold at C.

The son attained the age of twenty-one and died before his mother:

Held, that the legal personal representative of the son was entitled to be paid £40 a year until the death of the testator's widow or marriage; and that the after-ac-

quired leasehold at C., there being no contrary intention shown, within the meaning of the Wills Act (1 Vict. c. 26), s. 24, formed part of the leaseholds at C. which the testator possessed at his death, and which he specifically bequeathed to the son.

THIS was a creditors' suit for the administration of the estate of James Matthew Ord, who died in December, 1875, intestate, leaving two infant children surviving. Upon the Chief Clerk's certificate, questions arose as to the construction of the will of the intestate's father, James Ord, who died on the 16th of May, 1860, and who by his will, dated the 28th of March, 1859, after appointing two trustees and executors, gave unto them, their *heirs, executors, [668 and administrators, all his freehold and leasehold, and all his personal estates, of which he should be seised or possessed at the time of his decease, upon trust to permit his wife to have the use of his furniture and effects which should be in his dwelling house at the time of his decease, for the joint benefit of herself and his children during her life and widowhood, and as to all the residue of his personal estate, to convert the same into money, and after payment of debts and funeral and testamentary expenses (except such mortgage debt as should be charged on his leasehold estate at Chesterwood, thereafter bequeathed to his son James Matthew Ord), to invest the same as therein mentioned, and pay the interest, dividends, and annual proceeds of the personal estate, and the rents and profits of the real and leasehold estate, unto his wife for her life if she should continue his widow, she thereout maintaining his children living at his death, provided that if his son should attain the age of twenty one years before he should become entitled in possession to his (the testator's) estate at Chesterwood, thereafter bequeathed to him, he should be paid by the trustees, as his share of the same income, £40 annually from the period of his majority to the death or second marriage of his wife, and after her decease or future marriage, in trust to assign all his leasehold houses, lands and premises, situate at Chesterwood (charged, nevertheless, with the payment of all mortgage debts charged thereon, and "also with the payment of the annuity of £9 now charged thereon in favor of my sister"), unto his son J. M. Ord, his executors, administrators, and assigns, for his and their own use and benefit. There was a gift over of this property in case the son should die under twenty-one years of age without leaving children, and then the testator directed his trustees to sell all his real and leasehold estates ("except my leasehold property hereby bequeathed to my said son"), as therein mentioned, and stand possessed of the

proceeds of those estates and of his personal estate upon trust for all his children (exclusive of his said son) living at the time of his decease who should attain the age of twenty-one years, equally. The testator declared that if his wife should desire to carry on his business of a farmer on his estate at Chesterwood for the joint benefit of herself and his children, she should be at liberty to do so until her death [669] or *future marriage, and the trustees were to allow her to occupy the farm and to take all the stock, live and dead, which should be upon it at the time of his decease, and upon her death or second marriage the trustees were to sell such stock for the benefit of his children (exclusive of his said son).

James Ord had at the date of his will one son and three daughters, and was at that time possessed, 1, of a leasehold property at Chesterwood, held under a lease dated the 2d of October, 1654, for a term of 500 years, which he derived from his grandfather, and which was subject to the payment of the annuity of £9 above mentioned; 2, of another leasehold property at Chesterwood, adjoining the former, held under a lease dated the second of October, 1654, for a term of 500 years, and which he purchased on the 8th of November, 1858, and afterwards mortgaged to secure the payment of £180; 3, of an estate of freehold and copyhold called Barker House, situate at Hexham; 4, of some freehold and leasehold houses at Haydon Bridge; and, 5, of farming stock, furniture, and household effects at Chesterwood. After the execution of his will, James Ord, on the 12th of October, 1859, entered into a contract for the purchase, at the price of £1,900 (£200 of which he paid as a deposit), of another leasehold property, which was also situate at Chesterwood, and adjacent to the leaseholds to which he was entitled at the date of his will. The purchase was to be completed on the 13th of May, 1860. In November, 1859, the testator sold his property called Barker House (the principal property devised by him in favor of his younger children) for £2,150, and on the 12th of May, 1860, that sale was completed and purchase-money received. The 13th of May, the day originally fixed for the completion of his own purchase, was a Sunday, and consequently the 15th of May was afterwards fixed, but on the 14th the testator was suddenly stricken with apoplexy, and died on the 16th. The purchase was subsequently completed by the trustees and executors, and the property was assigned to them.

The testator left his widow, and son, and three daughters (who had attained twenty-one years of age) surviving. The

questions were whether the leasehold property purchased after the execution of the will passed to the son under the specific bequest, or to *the daughters under the resid- [670] uary bequest, and whether the annuity of £40 ceased on the son's death, or whether the administrator of his estate was entitled to it.

W. Brodrick, for the plaintiff, stated the facts of the case.

Dickinson, Q.C., and *Armstrong*, for the defendant the administrator, after referring to the cases of *Cole v. Scott* (1) and *Castle v. Fox* (2), submitted that in construing the will of James Ord it must be read as if the word "now" in the description of the annuity as "now charged thereon" did not refer to the date of the will, but to the date of its coming into operation—the death of the testator, and therefore, under the circumstances which had happened, the son or his estate was entitled to £40 a year until the death of the widow; and also to all the leasehold property at Chesterwood which the testator was possessed of at the time of his death.

Eddis, Q.C., and *Oswald*, for the defendant the widow: That the after-acquired leasehold property did not pass under the specific bequest of leasehold property to the son. The 24th section of the Wills Act (1 Vict. c. 26) enacted that every will should be construed with reference to estates comprised in it to take effect as if it had been executed immediately before the death of the testator, unless a contrary intention should appear by the will. The question is whether it can be gathered from all the circumstances existing at the time when the testator made his will that there was not an intention on his part that any after-acquired property should pass to the son. That is the principle laid down by Lord Cottenham in *Cole v. Scott* (3). What the court must look at is the general intention, and consider whether it is sufficient to show a contrary intention, though not so expressed within the meaning of the section. On a point of this kind parol evidence is admissible. The leaseholds at Chesterwood which were referred to at the date of the will, and bequeathed to the son, were subject to an annuity and to a mortgage. The testator was occupying that property as a farm, and he gave power to *the trustees to allow his wife to occupy it, and to [671] carry on the business of a farmer after his decease for the joint benefit of herself and all the children. The after-ac-

(1) 1 Mac. & G., 518, 522.

(2) Law Rep., 11 Eq., 542.

(3) 1 H. & T., 477, 524.

quired property he never occupied, and there is no indication of intention in the will, or evidence, that he would add it to his farm, though it was quite true that the lands adjoined. That is the great distinction between this and other cases. The testator gave his leaseholds to his son "now" charged with the annuity and also charged with the mortgage, and did not intend to give the other leasehold to him. There is in the use of the word "now" and the other circumstances quite enough to enable the court to hold that there was a contrary intention: *Webb v. Byng* (*). *Cole v. Scott* (*) is an authority clearly in favor of the widow's claim; and the 24th section should receive a liberal interpretation to support it. It cannot be contended that when a testator referred to particular leaseholds he meant to give the property which he had at the date of his will, or should have at the time of his death. The testator by his will made a fair apportionment of the whole of his property amongst all his children, and that also showed that he could not intend to give this after-acquired leasehold to his son.

As to the annuity, that was a gift to the son for his personal advantage, and it could not be made to extend to a period beyond his life: *Savory v. Dyer* (*).

There is no authority to support the view that if the son predeceased his mother the annuity ought to be continued to his legal personal representative. An annuity given to A. B. is only for his life, and if it were intended to extend it beyond, there must be words used other than executors and administrators, to do so.

[The cases of *Hutchinson v. Barron* (*); *Lady Langdale v. Briggs* (*); *In re Midland Railway Company* (*); *Doe v. Walker* (*); *Stevens v. Bayley* (*); *Bothamley v. Sherson* (*), were also referred to and commented upon during the argument.]

672] *HALL, V.C.: I am of opinion that the sum of £40 was not given to the son as from his attaining the age of twenty-one years as an annuity at all, but as his share, as from that age, of the rents and profits of the estates, and from that time until he became possessed of the estate bequeathed to him that share was to be his absolutely. It was an acceleration of his interest in the estate. Upon the whole, I think that is a sounder construction of the will than giving him an interest limited to his life as an annuity. I do

(*) 1 K. & J., 580.

(*) 1 Mac. & G., 518, 522.

(*) Dick., 162.

(*) 9 W. R., 538; 6 H. & N., 583.

(*) 8 D. M. & G., 391.

(*) 34 Beav., 525.

(*) 12 M. & W., 591.

(*) 8 Ir. C. L. Rep., 410.

(*) Law Rep., 20 Eq., 304; 13 Eng. R., 814.

not forget that there is a provision in the will for the maintenance by the wife, out of the rents and profits of all the children. Then as to whether the leasehold property, after acquired, is included in the specific bequest to the son, I am of opinion that there is not enough to enable me to say judicially that there is a contrary intention shown. In the original gift the words are all freehold and leasehold and all personal estates of which the testator was seised or possessed at the time of his decease upon the trusts mentioned, and then there is a direction to assign all his leasehold houses, lands, and premises situate at Chesterwood, unto his son absolutely. There are no words in the trust to assign the leasehold property at Chesterwood which limit the property there to that which he possessed at the date of his will. That being so, I must see whether there is anything elsewhere that does so; and what is relied upon is, that the son's legacy is charged with an annuity of £9 and a mortgage—that the property is divided into two parts, the one part charged with the annuity and the other with the mortgage; but I cannot collect from the language of the will, which is not perfectly accurate, that the charges do not affect the whole of the property, nor can I collect that the words “all my leasehold houses, lands, and premises,” are to be read as “such of my leasehold houses, lands, and premises situate at Chesterwood as I am at the date of this my will possessed of.” It is quite true that these are the charges which are mentioned, but I could not by reason of their existence narrow the disposition, even if there were a greater inaccuracy in the language of the will. It is no doubt in evidence that the mortgage debt affects only a part of the property, but I must give the words describing the bequest of the property their proper interpretation. Then it was suggested that the gift might be *cut down because the testator gave [673 power to the trustees to allow the widow to carry on the business of the farm until her death or future marriage, but I cannot include in that power only that property which the testator farmed at the time of his death. I must give full effect to the language of the will, and I hold that the annual payment £40 was to continue until the intestate became entitled in possession to his share of the testator's estate, and that it is now payable to his legal personal representative during the life of the widow or her widowhood; and also that the after-acquired leasehold property at Chesterwood, which was purchased by the testator after the date of his will, forms part of the specific gift to the son freed from any liability for the unpaid purchase-money in respect of such

leasehold property. As the interests of the defendants are in conflict, each of them must have the costs of appearing on further consideration.

Solicitors: *Bell, Broderick & Gray*, agents for L. C. Lockhart, Hexham.

See 23 Eng. Rep., 659 note; 25 Eng. Rep., 173 note; 2 Weekly Jur., 555.

In an action brought by executors for the construction of the will of the testator, where several heirs and devisees claiming under the will are made defendants, and a decree or judgment of the court is pronounced allowing the claims of some of the defendants as against the others, the latter defendants, on bringing an appeal from the judgment, in order to effect their appeal, must not only serve their notice of appeal and other papers upon the plaintiffs, but also upon the defendants who have established their claims under the will, as these defendants are an "adverse party" within the meaning of the Code: *Cotes v. Carroll*, 28 How. Pr., 436; *Wood v. Bailey*, 21 Wall., 640; *Hiscock v. Phelps*, 2 Lans., 106, 49 N. Y., 97; *Barnes v. Stoughton*, 6 Hun, 254, 255; *Brown v. Evans*, 34 Barb., 594, 604; *Thompson v. Ellsworth*, 1 Barb. Chy., 624; *Gilchrist v. Rose*, 9 Paige, 66; *Potter v. Barker*, 4 Paige, 290; *Kellett v. Rathbun*, Id., 102; *Wilcox v. Smith*, 28 Barb., 328-9; *Pittsburgh, etc., v. St. Louis, etc.*, 38 Ind., 153; *Wickham v. Hess*, Id., 184; *McClure v. Taylor*, Id., 427; *Teackle v. Crosby*, 14 Md., 14; *Masterson v. Hindon*, 10 Wall., 416; *Pierson v. Hall*, 64 Ind., 254.

See *Pickersgill v. Read*, 7 Hun, 636; *Garnsey v. Knights*, 1 Thomp. & Cooke, 259, 60 N. Y., 646; *Morgan v. Smith*, 70 N. Y., 537; *Morrison v. Morrison*,

16 Hun, 507; *Wade on the Law of Notice*, §§ 1218-1219.

Where such adverse defendants are not served with notice of appeal, etc., to effectuate the appeal as to them, but their attorney is served with copies of the case and notice of argument, on bringing the appeal to a hearing, the attorney thus served may, on motion, have the cause stricken from the calendar as respects the defendants he appears for, with costs: *Cotes v. Carroll*, 28 How. Pr., 436, 81 How., 146.

See 5 Russell's Chy., 63-4, note to *Banks & Co.'s ed.*; *McCullough v. Colby*, 4 Bosw., 608.

A complaint in foreclosure alleged that certain defendants had liens on the mortgaged premises which were subsequent to the lien of the mortgage. The defendant G., a subsequent judgment creditor, did not answer. The other defendants served answers alleging that their liens were prior to that of the mortgage. A judgment was entered so declaring, and a sale was made subject to these liens. Held, that such a judgment was unauthorized, and that plaintiff had no right in this action to establish these liens as against G., who had no knowledge of this clause in the judgment, and was not served with the answers under section 521 of the Code of Civil Procedure: *Payn v. Grant*, 11 N. Y. Weekly Dig., 197, Supreme Court, 3d department.

[9 Chancery Division, 678.]

V.C.H., July 24, 1878.

In re HODGSON, Deceased.

HODGSON V. FOX.

[1875 H. 119.]

Legacy to Bankrupt Debtor—Set-off—Retainer—Dividend.

A week before the death of a testatrix, a debtor to her, who was one of the residuary legatees under her will, dated several years previously, became bankrupt. The debt was never proved by the testatrix in her lifetime or by her executors after her death, nor had any dividend been declared in the bankruptcy.

Held (following *Cherry v. Boulbee* (1)), that the executors of the testatrix were not entitled to set off or retain the amount of the debt due to the testatrix against the share of the bankrupt; nor, under the circumstances, any amount in respect of dividend on such debt.

FURTHER CONSIDERATION. The testatrix, Mrs. Emily Catherine Hodgson, by her will, dated the 29th of December, 1862, gave all her residuary real and personal estate to trustees, whom she also appointed her executors, upon *trust for sale and conversion, and to divide the pro- [674
ceeds equally among her children.

In the year 1869, she lent one of her sons, E. H. Hodgson, who was one of the trustees and executors of her will, the sum of £500. She died in February, 1875; no acknowledgment had been made of the debt since January, 1869, when E. H. Hodgson had given her a receipt for the loan as bearing interest at £5 per cent., and as payable by ten half-yearly payments, the last of which was payable in January, 1874; but nothing had ever been paid by him either on account of principal or interest. The testatrix left eight children, two of whom were lunatics. E. H. Hodgson had been adjudicated bankrupt in 1875, a week before the death of the testatrix, but the debt had never been proved nor had any dividend been declared in the bankruptcy; and the question was, whether the trustees and executors of the testatrix were entitled to retain out of the bankrupt's one-eighth share of her estate the moneys due in respect of the debt, or anything in respect of any dividend in the bankruptcy.

Dickinson, Q.C., and Mander, for the plaintiff.

Marcy, for one of the residuary legatees: The general rule is, that when a legatee is indebted to the testator, the executor may retain the legacy in whole or in part, by way

(1) 2 Keen, 319; 4 My. & Cr., 442.

of set-off, *Jeffs v. Wood* (1); and this holds good, notwithstanding that the legatee may have become bankrupt: *Lee v. Egremont* (2), and *Bousfield v. Lawford* (3); Williams on Executors (4). *Cherry v. Boulton* (5) will be relied upon as an authority that the rule does not apply as against the assignee of a legatee who becomes bankrupt in the lifetime of the testator, but in that case Lord Langdale overruled Sir John Leach in *Ex parte Man* (6), and doubts have been thrown upon the soundness of the decision: *Freeman v. Lomas* (7); Williams on Executors (8). Moreover, in *Cherry v. Boulton* the bankruptcy of the legatee preceded the date 675] *of the will, and the will showed an express intention to benefit the bankrupt.

H. B. Buckley, for the committees in lunacy of two other residuary legatees: Notwithstanding the Statute of Limitations of 21 Jac. 1, c. 16 (the statute which is applicable to the present case), an executor may retain so much of a legacy as is sufficient to satisfy a debt due from the legatee to the testator, for that statute only bars the remedy and leaves the right untouched: *Courtenay v. Williams* (9); *Coates v. Coates* (10).

The soundness of the decision in *Cherry v. Boulton* (5) has been questioned; but even if that case is an authority that the entire debt cannot be set off in case of the bankruptcy of the legatee, there is no authority against a set-off in respect of the dividends under the bankruptcy, and to this, at all events, we are entitled.

Plucknett, for other parties.

W. Pearson, Q.C., and *Oswald*, for the trustee in bankruptcy of E. H. Hodgson: *Cherry v. Boulton* was affirmed on appeal, and *Ex parte Man* disapproved by Lord Cottenham (11). It was followed in *Bell v. Bell* (12), and is undoubtedly good law: Robson on Bankruptcy (13).

The right of the executor of a creditor is not a right of set-off, but rather a right to pay out of a fund in hand, and in this case the testatrix died a week after the bankruptcy of E. H. Hodgson, so that there was not at the time of the bankruptcy any right or claim on the part of the bankrupt's estate against her, nor any legacy or fund payable by her or her executor to the debtor.

(1) 2 P. Wms., 128.

(2) 5 De G. & Sm., 348.

(3) 1 D. J. & S., 459.

(4) 7th ed., 1804.

(5) 2 Keen, 319; 4 My. & Cr., 442.

(6) Mont. & Mac., 210.

(7) 9 Hare, 109, 113.

(8) 7th ed., 1307.

(9) 3 Hare, 539.

(10) 33 Beav., 249, 252.

(11) 4 My. & Cr., 442, 448.

(12) 17 Sim., 127.

(13) Pages 339, 340.

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While as to a dividend under the bankruptcy, neither the testatrix nor her executors have ever proved the debt, nor has any dividend ever been declared in the bankruptcy; so that the court is not in a position to make any order to retain or set off any sum (which must be a speculative one) in respect of any possible dividend.

*HALL, V.C.: I consider that this case is governed [676 by *Cherry v. Boulton*. As regards the retainer of anything in respect of a dividend under the bankruptcy, what appears from the two reports of *Cherry v. Boulton* (') does not satisfy me that it would be proper for the court, in every case of a bankrupt legatee, to direct, in making its order, that some sum should be deducted by the executors of the creditor on account of a dividend. It may well be that in *Cherry v. Boulton*, where the bankruptcy had occurred a year and a quarter before the death of the testatrix, the creditors claiming the amount of the assets, the costs of the bankruptcy, and the amount of the dividend had been ascertained, so that the amount to be deducted or allowed could also be ascertained or was known. But in the absence of any such materials I am not able to make any working order as to the deduction of any sum whatever in respect of a dividend upon this debt.

The whole of the bankrupt's share must accordingly be paid to his trustee without any deductions.

Solicitors: *J. S. Ward; J. B. Hocombe; Crook & Smith.*

(') 2 Keen, 319; 4 My. & Cr., 442.

[9 Chancery Division, 677.]

Fry, J., May 13, 1878.

*MASTERS V. PONTYPOOL LOCAL GOVERNMENT [677
BOARD.

[1876 M. 368.]

Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 155, 158—Local Government Board—Rebuilding—Depositing Plans—Approval—Allowing Work to proceed—Pulling down—Notice.

The owner of a house after having, in accordance with a by-law of the Local Government Board, left, on the 16th of October, a plan of an intended new building, the local board passed a resolution that the plan was approved of, and that he should be offered £40 for certain land of his thrown into the street. He refused to accept the £40 but proceeded with his works, and by the 26th of October had pulled down the front wall of his house. On the 27th of October the board passed a resolution abandoning the terms before offered, and requiring him to set his frontage further back. This notice was given under sect. 155 of the Public Health Act, 1875, as on the front of a house having been pulled down. On the 27th of November the owner

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of the house proceeded with his building, and on the 21st of December he was served with notice to pull down his new building :

Held, that the local board having approved of a plan, and having allowed a house owner to proceed and pull down the front wall of his house, could not afterwards avail itself of the powers acquired when the front of a house has been taken down :

Held, that where a local board has not, during the month prescribed by the Public Health Act, s. 158, signified its disapproval of plans laid before it, it cannot afterwards object to the building according to the plan.

A local board cannot, under sect. 158, pull down a building without giving the owner an opportunity of showing cause why it should not be pulled down.

GEORGE MASTERS, the plaintiff in this case, was the owner in fee simple of an inn at Pontypool, called the Greyhound Inn, built upwards of fifty years ago. In June and July, 1876, he had made alterations in one part of his inn, when negotiations as to throwing a part of it into the road were carried on between him and the Pontypool Local Government Board, and an offer was made to him which he refused.

In September, 1876, he began to pull down the rest of the inn, and on the 29th of September the local board served him with the following notice, signed by the clerk to the board :

"I am instructed by the Pontypool Local Board to request you to forward me for their inspection a detailed [678] plan and section of *the premises now in course of erection at the Greyhound Inn, and also request you to discontinue building until the plan has received their seal and sanction."

This notice appeared to have been given under the 26th by-law of the local board, requiring every person who should intend to erect any new building to give notice in writing at the office of the local board of their intention, and at the same time leave at the said office plans and sections of the intended new building, and also leave a block plan showing the levels and certain other things specified. The 155th, 158th, and 159th sections of the Public Health Act, 1875, were relied on (').

(') 38 & 39 Vict. c. 55, s. 155 : "When any house or building situated in any street in an urban district or the front thereof has been taken down in order to be rebuilt or altered, the urban authority may prescribe the line in which any house or building or the front thereof to be built or rebuilt in the same situation shall be erected, and such house or building or the front thereof shall be erected in accordance therewith.

"The urban authority shall pay or tender compensation to the owner or

other person immediately interested in such house or building for any loss or damage he may sustain in consequence of his house or building being set back or forward, the amount of such compensation in case of dispute to be settled by arbitration in manner provided by this act."

Sect. 158: "Where a notice, plan, or description of any work is required by any by-law made by an urban authority to be laid before that authority, the urban authority shall, within one month after the same has been deliv-

*There was a conflict of evidence whether the front wall of the hotel was at this time pulled down, and in the opinion of the court the front wall was then standing up to the first floor except a space left for a cart, so that the case did not then come within the terms of sect. 159. On the 16th of October, 1876, Masters sent to the clerk of the local board a plan showing the new building as set back a certain distance. On the 17th of October the local board, at a meeting, passed a resolution that the line of building should be erected as shown in the plan sent in, and that the local board should offer Masters £40 for compensation for the land given up for street improvement. Some of the members of the local board then waited upon Masters and tried to induce him to accept the £40 for the piece of land, but he refused.

According to the statements on behalf of the local board, Masters was not informed that this resolution had been passed; but he appeared to have received, on the 19th of October, from the office of the local board, a letter authorizing him to proceed with the building according to his own plans. He, in fact, did proceed and pulled down the rest of the front wall of the hotel and began to rebuild. This had been done before the 27th of October, when the local board held a meeting and passed a resolution: "That Mr. Masters not having accepted the £40 offered by the board

ered or sent to their surveyor or clerk, signify in writing their approval or disapproval of the intended work to the person proposing to execute the same; and if the work is commenced after such notice of disapproval or before the expiration of such month without such approval, and is in any respect not in conformity with any by-law of the urban authority, the urban authority may cause so much of the work as has been executed to be pulled down or removed.

"Where an urban authority incur expenses in or about the removal of any work executed contrary to any by-law, such authority may recover in a summary manner the amount of such expenses either from the person executing the works removed or from the person causing the works to be executed, at their discretion.

"Where an urban authority may, under this section, pull down or remove any work begun or executed in contravention of any by-law, or where

the beginning or the execution of the work is an offence in respect whereof the offender is liable in respect of any by-law to a penalty, the existence of the work during its continuance in such a form and state as to be in contravention of the by-law shall be deemed to be a continuing offence, but a penalty shall not be incurred in respect thereof after the expiration of one year from the day when the offence was committed or the by-law was broken."

Sect. 159: "For the purposes of this act the re-erecting of any building pulled down to or below the ground floor, or of any frame building of which only the frame work is left down to the ground floor, or the conversion into a dwelling house of any building not originally constructed for human habitation, or the conversion into more than one dwelling house of a building originally constructed as one dwelling house only, shall be considered the erection of a new building."

as compensation for the land given up for street improvement (as shown in the plan), those terms are now abandoned, and that the line of frontage will now be from Mr. Masters' present building to the main building of the George Inn." This would set back the building further than as shown in his plan. Another interview then took place, and on the same day the local board gave Masters the notice following:

"That the board, under sect. 155 of the Public Health Act, 1875, require you to keep back in a line with the buildings on either side, namely, your existing buildings and the main [680] building of the *George Inn. And they are prepared to enter into negotiations for the land given up."

Masters thereupon ceased building, and on the 4th of November he received a letter from the local board requiring him to name an arbitrator for the purpose of fixing the price of the strip of land which the local board proposed to take, but Masters, being of opinion that the local board could not take the strip of land, refused to appoint an arbitrator. On the 27th of November Masters recommenced building in conformity with the plans which he had submitted to the local board. On the 19th of December workmen were sent by the local board to remove the new building, but nothing appeared to have been done by them, and on the 21st of December the local board served on Masters a notice to remove his building, and that if he did not they should proceed to do so.

Masters thereupon brought this action to restrain them, and for damages.

The local board brought a counter-claim for a declaration that Masters had erected his building in contravention of the Public Health Act and of the by-laws, and for an injunction restraining Masters from permitting the buildings erected by him to stand. One of the points relied upon by the local board was that Masters was, in violation of one of the by-laws, going to build over a small triangular space left between his property and that of the George Inn, and another point was, that he had not left sufficient space at the back of his building as required by one of their by-laws.

The action now came on for hearing; the evidence being by affidavit.

North, Q.C., Pritchard, and Simmonds, for the plaintiff: The plans were approved on the 17th of October, and the board could not after that disapprove merely because the plaintiff would not take £40 for compensation. The first

disapproval was on the 27th of October, at which time the board was precluded from disapproving by their previous conduct. The pulling down has not brought the plaintiff within section 155: *Slee v. Corporation of Bradford* ⁽¹⁾. Moreover, the board has no right to pull down a building *without hearing the owner, *Cooper v. Wandsworth Board of Works* ⁽²⁾; and the board must approve or disapprove within a reasonable time: *Hall v. Nixon* ⁽³⁾; *Baker v. Mayor of Portsmouth* ⁽⁴⁾. Most of these defences are mere afterthoughts, and ought not to be allowed to prevail.

Kekewich, Q.C., and *A. T. Lawrence*, for the defendants: The right to fix a line depends on sect. 155 of the Public Health Act, and does not arise until the building has been pulled down within the terms of sect. 159, and therefore the objection as to delay falls to the ground. The statutes are for the benefit of the public, and must be construed accordingly: *Kerr v. Corporation of Preston* ⁽⁵⁾. The board did disapprove within a month, which was the proper time.

[FRY, J.: You are asking me to prescribe a line, and you have not offered compensation.]

That is not necessary in order to enable the board to prescribe a line, and the compensation may be recovered at any time. As to any damages, the plaintiff has altered his plans and created the difficulty.

North, in reply as to the damages.

FRY, J.: This is an action brought by the plaintiff to restrain the defendants from pulling down his house and for damages. The question I have to decide is, whether the defendants had a right to require the plaintiff to observe the line of building prescribed by them on the 27th of October, 1876. Many objections to that right have been taken by the plaintiff.

[His Lordship then stated the facts of the case, and said that upon the evidence he found that on the 16th of October, when the plan was sent in, the front wall was not pulled down, but was left standing (except a space left for a cart) up to the first floor.]

That was the position which continued from the end of September to the 16th of October, when the plan was submitted by *the plaintiff to the board. On the 17th of [682 October, the plan was laid before the board, and it becomes a question what they did in regard to the plan; but I think they must be supposed to have done their duty, and a reso-

⁽¹⁾ 4 Giff. 262.

⁽²⁾ 14 C B. (N.S.), 180.

⁽³⁾ Law Rep., 10 Q. B., 152; 12 Eng. R., 218.

⁽⁴⁾ 3 Ex. D., 4.

⁽⁵⁾ 6 Ch. D., 463; 23 Eng. Rep., 86.

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lution was passed on the 17th of October, as follows: "That the line of building be erected as shown in the plan drawn by Mr. J. F. Williams, and that the board offer Mr. Masters £40 for compensation for the land given up for street improvement." Now the provisions contained in sect. 155 of the Public Health Act, 1875, are as follows.

[His Lordship then read sect. 155 of the Public Health Act, and continued:] From my finding, in regard to the position of the building on the 16th of October, I am of opinion that circumstances had not arisen which entitled the board at that time to prescribe the line. Then on the 19th of October, Mr. Stephens, the clerk, wrote to the plaintiff a letter authorizing him to proceed with his building in conformity with the plans submitted to the board on the 17th of October. It has been suggested that this letter was written in mistake by a friend of Stephens, but it seems to me very difficult to give much weight to that statement, and it appears to me that the line was prescribed by the board, and was communicated by letter to the plaintiff. That being so, the plaintiff resumed his work and caused the remainder of his front wall to be pulled down, and began to rebuild. The wall was down, and the foundations were put in by the 27th of October, on which day the board again met, and they then passed the following resolutions:—[His Lordship read them.] The question is, whether the board had power to pass these resolutions, which purport to alter the line previously prescribed by them.

The ground for abandoning the previous resolution is placed upon the refusal by the plaintiff of the £40, and the question again is, whether the board could on that account alter the line they had prescribed. The jurisdiction of the board on the 27th of October could only arise from the pulling down by the plaintiff of his front wall, and in my judgment that pulling down was induced by the resolution of the 17th of October, and I think that such a course of conduct is contrary to common fairness. The case of *Slee v. Corporation of Bradford* (1) shows, that where a local board 683] *has by means of plans approved of, or otherwise prescribed, a line of street, and has allowed a landowner to act upon the line so prescribed by them, they cannot afterwards prescribe another line. On that ground alone, I think the plaintiff entitled to relief.

There are numerous other objections raised by the plaintiff. First, that under the 155th section the urban authorities must make a tender of compensation at the same

(1) 4 Giff., 262.

time, and that none was made, though negotiations took place between the board and the plaintiff; but I do not go the length of saying that the tender must be made at the same time. Secondly, that the board was on the 27th of October unable to prescribe a line of street, because the rebuilding had gone too far; but I doubt if the evidence would justify that conclusion. I do not, however, determine the case on either of these grounds, but because, upon weighing the whole facts of the case, the result, as it appears to me, is that the prescription of the 27th of October was invalid.

Then as to the defence set up. The defendants say that the plaintiff had not submitted plans, and they could therefore proceed to pull down his building. This power is claimed by them under sect. 158 of the Public Health Act, 1875:—[His Lordship read the section.] The plaintiff deposited his plan on the 16th of October. The letter of the 19th of October is not in itself very distinct as to plans; but in my opinion it permits a building to be erected in accordance with the plan. Now, a man who has been told that he may proceed with his building in accordance with the plan which he has submitted, may well say that his plan has been approved of. But further than that, the board did not actually object. They were bound to approve or disapprove within a month, and they are consequently in this dilemma. Either they have by the resolution of the 17th of October signified their approval of the plan submitted to them, or they have not signified their objection within one month. In either alternative they cannot now succeed. Then as to the block plan, no doubt the by-laws require a block plan to be deposited; but this objection was not taken until after the suit was commenced, and a letter of the 13th of December, written by the board to the plaintiff, did not require a block plan. It would be unfair to allow an objection of that kind to prevail, and that defence also fails.

*Then as to the plaintiff's deviation from the plan. [684] The plan deposited showed a small triangular space left between the Greyhound and the George; but in November an arrangement was made between the plaintiff and the owner of the George Inn, by which that space was to be built over, thereby getting rid of a damp useless corner, and giving support to the George. The building in December showed that this was to be done, but the notice of the 21st of December does not point this out, and the objection was never made until after this action was brought. In my opinion, such an objection cannot be allowed to prevail. But it is further to be observed, as to the last two heads of defence,

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that the board ought, before proceeding to pull down the building, to have called on the plaintiff to show cause why it should not be pulled down. A local board has not authority at once to pull down buildings on the ground of plans not having been deposited, or the deposited plans not having been complied with, and before taking any such step the board must call on the owner of the house to show cause. *Cooper v. Wandsworth Board of Works* (1) shows that the board is not to exercise its summary powers without giving the landowner an opportunity of showing that they are not required.

In my opinion the plaintiff is right in coming here, and the only remaining question is as to the damages. The plaintiff himself at first put them at £5; he has since sought to recover more as damages consequent on the delay in completing his building. I should be sorry to encourage people in conducting operations in opposition to the local board, but I think that the plaintiff might have gone on with his building, and that there was only a trifling damage. I cannot give him more than £5. The form of the injunction will be according to the prayer of the claim.

It remains to deal with the counter-claims. In support of them, two points were raised; first, the plaintiff's building over the wedge-shaped space lying between his building and the George Inn. But my previous observations dispose of that objection. Moreover, I think that the board could not proceed to pull down on this ground without first giving the plaintiff the opportunity of being heard; and if I am to be the judge, I find that the building over that wedge-shaped space was proper.

685] *The next point raised is want of space in the rear of the building. This objection is raised under one of the by-laws, and was not taken until after the action was begun, nor has the board ever given the plaintiff an opportunity of showing cause. The objection was merely an afterthought, and I shall not attend to it.

The counter-claim will be dismissed with costs, and the plaintiff must have the costs of the action.

Solicitor for plaintiff: *J. F. Raw*, agent for *R. Graham*, Newport, Mon.

Solicitors for defendants: *Few & Co.*, agents for *Greenway & Bytheway*, Pontypool.

(1) 14 C. B. (N.S.), 180.

[9 Chancery Division, 685.]

Fry, J., June 18, 19, 20, 21, 1878.

LORD ROKEBY V. ELLIOT.

[1872 R. 21.]

Mining—Winning—Working—Expenses—Profits—Allowances—Bad Debts.

By a deed of grant and license the licensee was empowered to work and win the coal mines under certain lands, and, out of the profits to arise by the sale of the coals, to reimburse himself all expenses of the winning thereof; and after full payment of such expenses of winning the coal mines the licensee was to pay the licensor a sum of money in respect of the coals raised as therein mentioned.

The licensee reached the coal mines by a driftway from an adjoining colliery, and worked the coal :

Held, that the coal was won, according to the meaning of the deed, on the day when it could be worked through the driftway, and that no expenses subsequently incurred could be included in the expenses of winning :

Held, that the expense of the driftway was to be paid out of the profits, though it had been used for the purposes of the adjoining colliery :

Held, that in estimating the profits out of which the expenses of winning were to be reimbursed, all the expenses of working and selling the coal, including bad debts, must be allowed.

By an indenture bearing date the 7th of March, 1775, and made between Edward Montagu of the one part, and John Tempest of the other part, the said Edward Montagu conveyed and assured to the said John Tempest and his heirs the one undivided fourth part of Edward Montagu in the manor of Barmston, in the county of Durham (except one undivided fourth part of and in all collieries, coal mines, seam and seams of coal lying under the lands in the said indenture particularly mentioned and described), unto and to *the use of John Tempest, his heirs and assigns. [686] And the indenture contained the following proviso :

“That it shall and may be lawful for the said John Tempest, his heirs and assigns, at his and their own costs and charges, from time to time and all times forever hereafter, by such ways and means as he or they shall think fit, to win and work all and every or any of the coal mines, seam and seams of coal, within or under the said lands and grounds hereinbefore particularly mentioned and described or any part or parts thereof, and, in the first place, to reimburse himself and themselves all such costs, charges, damages, and expenses whatsoever which he or they or any of them shall bear, pay, sustain, expened, or be put unto in and about the winning thereof, only by, with, and out of the profits to arise by sale of the coals which shall be wrought or gotten out of the said coal mines, seam and seams of coal

as aforesaid; and from and after full payment made to the said John Tempest, his heirs, executors, administrators, or assigns, of all such costs, charges, damages, and expenses as he or they shall be at or put unto in winning the said colliery, coal mines, or coal mine, seam or seams of coal, that he, the said John Tempest, his heirs or assigns, shall and will pay or cause to be paid unto the said Edward Montagu, his heirs or assigns, such sum of money for and in respect of every one-fourth ten of coals, Sunderland measure, which shall be yearly wrought and gotten out of the said coal mines, seam or seams of coal, as shall from time to time be awarded by two indifferent persons conversant in the coal trade in the said county of Durham, by writing to be signed, sealed, and delivered by the said two persons, the one of such two persons to be from time to time nominated by the said John Tempest, his heirs or assigns, and the other of such two persons by the said Edward Montagu, his heirs or assigns, once in every five years on the 1st of January in every such fifth year whilst the said coal mine, seam or seams of coal, shall continue to be wrought by the said John Tempest, his heirs or assigns, as aforesaid; and the first of such nominations to be made on the 1st of January next after the said John Tempest, his heirs or assigns shall have been paid out of the said profits all his and their costs, charges, damages, and expenses in and about such winning as aforesaid."

687] *The estate and interest of Edward Montagu in these seams of coal had become vested in the plaintiff, Lord Rokeby; and the estate and interest of John Tempest had become vested in the defendant, Sir George Elliot, under a lease from the Marchioness of Londonderry dated the 5th of November, 1864.

Sir G. Elliot was the owner of the Usworth Colliery, which adjoined the Barmston estate, and had on the 15th of July, 1864, entered on one of the coal seams under the Barmston estate by means of a drift from the Usworth Colliery, and had thereby worked and carried away and sold the coal in the Barmston Colliery. There were three seams of coal in the Barmston Colliery, and Sir G. Elliot had run a drift into one of the seams, the Maudlin Seam, and had sunk a pit on another, the Low Main Seam, but had continued to work only the uppermost, or Maudlin Seam, as the Low Main Seam had proved not worth working. He had continued to work the Barmston coal through the Usworth Colliery, and had sold the coals together.

The plaintiff had in 1869 discovered that the defendant

was working the Barmston coal, and had then claimed payments under the deed of 1775 in respect of the coals wrought and gotten out of the Barmston Colliery. Much correspondence took place as to the allowances and the appointment of arbitrators, and the original bill in this suit was filed in 1872, praying for accounts and for payment to the plaintiff of what the court should determine to be a proper royalty in respect of every fourth ten of coal got from the Barmston Colliery.

The suit now came to a hearing, and much evidence was adduced as to the meaning of the word "winning," and as to the expenses incurred. The principal questions argued were as to the time when the coal was won, and the allowances to be made to the defendant for the cost of winning; and as to the manner in which the profits were to be ascertained, so as to determine when the defendant was reimbursed the cost of winning.

The questions and the further facts relating to them are stated in the judgment given below.

Cookson, Q.C., and H. A. Giffard, for the plaintiff.

**Kay, Q.C., North, Q.C., and Williamson, for the [688 defendant.*

FRY, J., after reading the principal clauses of the conveyance, and stating the facts, and that the defendant might have been treated as a trespasser before the 5th of November, 1864, continued :

The first question I have to determine is as to the meaning of the proviso descriptive of the costs, charges, damages, and expenses which the licensees shall bear, pay, sustain, expend, or be put to in and about the winning of the coal mine, seam and seams of coal. Now that question, it appears to me, must be answered by inquiring what is the "winning," and upon that much controversy has arisen. On the part of the plaintiff it is contended that the "winning" referred to in this proviso is a single act, a thing which must be done once for all, and can never be repeated. On the part of the defendant it has been urged that the "winning" is a thing which may happen from time to time, and, therefore, is not a single act. In my judgment the contention of the plaintiff is correct on this point. I think that the "winning" referred to in this instrument must be taken to be a single thing. It is quite true, as has been urged upon me on behalf of the defendant, that the proviso gives power to the licensees from time to time at all times thereafter to win and work the coal mines; it is quite true that the words used in respect of that which is to be won are "coal mines,

seam and seams of coal, within or under the said lands." But notwithstanding those expressions which no doubt countenance the view that winning may be a thing repeated from time to time, still it appears to me that that is not the true meaning of the expression. The scheme of the proviso draws a distinct line between the time when the profits of the working of the coal are to be applied towards the cost of the winning and the time when the whole of those profits taken by the licensee are to be calculated, he being liable to pay such sum as shall be assessed by the referees in the nature of a royalty (I do not say a royalty) for every one-fourth ten of coal. There is what is now often called a hard and fast line drawn between those two states of circumstances; and the rights of the licensor and licensee before and after the satisfaction of the cost of winning are different [689] in every respect. But *if the costs of winning are a single thing, the satisfaction of which is to happen once for all, it follows that the winning itself must be a single thing, because if the winning could be done from time to time, the expenses of winning would accrue from time to time, and the expenses of winning would have to be satisfied from time to time.

There is another observation, that not only does the deed itself draw this line, and draw it with reference to the winning, but it provides that the first nomination of these quinquennial referees or valuers shall be made after the winning charges have been satisfied by the profits. But how can such a clause as that be applicable to a thing which is to arise from time to time? It appears to me, therefore, on the true construction of the deed, that winning is a thing which is to happen once for all.

What, then, is this single act of winning? I have, of course, had reference, in determining this question, to what appears to me to be the scheme and meaning of the proviso. I bear in mind, also, the definition which has been given of winning by both the Lord Chancellor and the Vice-Chancellor James, in the case of *Lewis v. Fothergill* (*). I think it enough to say that in this case I consider winning to mean the performance of all those conditions necessary for the continuous working for sale of the coal comprised in the Barmston Colliery. Now, the best evidence that can be afforded that the conditions *sine qua non* to the existence of a thing are satisfied, is the existence of the thing itself; and here I find that on the 15th of July, 1864, the continuous working of coal in that colliery began for the purpose

(*) Law Rep., 5 Ch., 103.

of sale. What is the inference? It is to my mind inevitably this, that on the 15th of July, 1864, the coal was won.

But then it is said that large outlays referable to capital account, the benefit of which, in fact, has been spread over several years, have been from time to time made after the winning, and it is said that it is highly unreasonable not to treat those as the expenses of winning, although they may have happened after that particular event. They would, it is said, have been expenses of winning if they had been incurred before the coal had been reached, and why are they not to be expenses of winning if they *are incurred [690 after? The answer appears to me to be this: As I have already pointed out, the winning is a single act, and it is not because there is capital expenditure for subsequent purposes of the colliery, that coal can be said not to be won. It is of common knowledge that the outlay of a very large amount of capital on works, the whole benefit of which is not reaped within one year, is an ordinary incident to enterprises and undertakings of this description. The present case affords an abundant illustration of that. Some three years after the collieries had been reached and the working had begun, it was found that the coal was of a highly dangerous description, and that it was necessary to increase the ventilation of the coal mine, and accordingly for that purpose only a new shaft was put down. It is said that that heavy outlay of capital ought to be charged as a winning expense. The answer, as it appears to me, is, that this is a common expense of working a coal mine after it is won. Such expenses occur from time to time during the existence of a colliery. If they are paid out of the winning the winning of a colliery can never be complete until the colliery itself has been exhausted. That is a conclusion which I think is at variance with the ordinary meaning of the word, and certainly with the intention of this deed. Therefore I consider that no such allowance can be made.

Having come to that conclusion, it appears to me that the most convenient course will be for me to call attention to the various charges which the defendant has insisted upon as being costs of winning. The first charge relates to the stone drift through the first series of troubles. Those troubles were faults or dislocations of the strata, not in the Barmston Colliery, but in the Usworth Colliery, and in the neighborhood of the pit. It is said by the plaintiff that, inasmuch as the driftway which was pierced through those troubles was used for the purpose of the Usworth Colliery, no portion of the expenses of that driftway ought to be

allowed as expenses of winning the Barmston Colliery. I do not think that that contention can be maintained. Upon the evidence before me I come to the conclusion that the driftway, with the necessary airways and the necessary gates, was laid down by Sir George Elliot substantially for the purpose of winning the Barmston Colliery. I have no doubt that [691] the plaintiff is quite right in saying, and it *is scarcely denied, if at all denied, that those ways when so constructed would be a very convenient mode of working a portion of the Usworth Colliery, and have been used accordingly, but I do not think that the mere subsequent user of the driftway for the benefit of the person who owns the other colliery will prevent him from treating that as a charge of winning the coal in this colliery. I therefore allow as part of the charges which the defendant is entitled to, the sum of £210 expended in the year 1862, the sum of £217 0s. 11d. expended in the year 1863, and so much of the sum of £11 18s. 2d. expended in the year 1864 as was expended before the 15th day of July in that year. I disallow the expenditure in 1865, because, in my judgment, that was subsequent to the winning.

[His Lordship then proceeded to disallow the cost of making a certain wagon-way as not part of the costs of winning; and he allowed the costs of certain works executed before the 15th of July, 1864, and disallowed the costs of certain works executed after that day, and directed the expenses of certain other works to be apportioned. He disallowed the expenses of sinking the pit on the Low Main Seam, as it did not result in a winning. He disallowed the costs of the pit sunk in the year 1867 for the purpose of better ventilation, as the winning was effected without it, and the necessity for it did not arise until some years afterwards. His Lordship allowed the defendant interest at the rate of 4 per cent. on the sums expended by him in winning the coal. His Lordship then continued :]

The second question which arises is this. What is the meaning of "the profits to arise by sale of the coals which shall be wrought or gotten out of" these coal mines, and out of which the costs of winning are to be satisfied?

Now, here again two views have been presented. The plaintiff says the profits to arise by the sale are the gross returns from the coal. The defendant says they are not the gross returns, but the gross returns after deducting all working expenses, in which he says should be included not merely the wages of the workmen and the expenditure on stores, but just allowances in respect of bad debts, the interest on

the capital expended by the persons doing the work, and an allowance for wear and tear and depreciation. It appears that the word "profits" may be used in both ways, *and I have to consider what is the natural and prob- [692
able meaning of it in this case. Now, I think there is something absurd in paying a man his winning expenses out of profits, but not allowing him to deduct his working expenses from his gross profits. You would be apparently indemnifying him in respect of one expense when you at the same time would be depriving him of that advantage by charging him with another expense. It is true, as has been urged by Mr. Cookson, that perhaps the referees might take that into account in estimating the amount of *quasi* royalty to be put on the coal raised, but I do not think that that is a satisfactory answer. I think the profits out of which the expenditure of the licensee is to be made good are what I may call a clear fund—a fund which is reasonably applicable to the winning expenses after satisfaction of everything in the nature of working expenses. Therefore I propose to declare in substance that the profits, according to the true construction of the deed, are the gross returns, less the working expenses, and that in such working expenses are to be included just allowances in respect of interest on capital expended, in respect of bad debts, and in respect of wear and tear of machinery. Perhaps I might say with regard to bad debts that I think it is reasonable to allow them; for, in the first place, I think the sale must be considered to have been a sale according to the ordinary mode of selling coal, which, no doubt, is to some extent on credit. In the next place, I think that if the sale had not been for credit the price would have been less, and therefore, to use a common expression, the thing is as broad as it is long. If the defendant had had no bad debts he would have had to sell for less money, and if he sold so as to incur bad debts, he got nominally more money, although perhaps in the result he did not get above the same amount.

Then the next question is this. It appears that the coal raised from the Barmston Colliery has been throughout mingled by the defendant with the coal from the Usworth Colliery. He says that he has so mingled it because it was of an inferior description and would not have been merchantable without so doing. But the fact that no separate sales have been made of this coal interposes a very great difficulty in the way of ascertaining what the market value was. No attempt has been made by the defendant *to [693
fix its price or to invoke the assistance of the plaintiff in

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In re Hamilton. Ex parte Hamilton.

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fixing its price. It is said that it is possible to ascertain what its value would be by an inspection of the remains of the coal in the colliery. I do not think that that would be satisfactory. The pillars in the colliery must undergo change from the effects of air and water, and I am not satisfied that there is any means now available by which, without incurring an expense which I do not think the plaintiff ought to be put to, the true market value of coal sold from time to time can be ascertained. Moreover, it appears from the evidence that the coal from Barmston is not of a uniform value, and that as the workings have gone further the coal has got worse. How, then, can I ascertain, without a most elaborate and probably futile inquiry, the different values of the different portions of this coal? I think that the defendant has placed himself in a position in which he has rendered it impossible for the court satisfactorily now to ascertain the market value of the coal, and accordingly the doctrine of confusion does apply, and the Barmston coal must be taken to have been of the same value ton for ton as the coal which was sold.

His Lordship then directed the accounts to be taken accordingly, reserving further consideration; when the questions as to fixing the amount to be paid to the plaintiff would if necessary be argued and decided.

Solicitors for plaintiff: *Frere & Co.*

Solicitors for defendant: *Williamson, Hill & Co.*

[9 Chancery Division, 694.]

C.J.B., May 27, 1878.

694] *In re HAMILTON. Ex parte HAMILTON.

Bankruptcy—Order for Discharge—Bankruptcy Act, 1869, s. 48—Proper Resolution of Creditors—Discretionary Power in Judge.

Where a special resolution of creditors under the Bankruptcy Act, 1869, s. 48, has been properly passed, stating that in their opinion the bankrupt cannot justly be held liable for his failure to pay 10s. in the pound, and desiring his discharge, and the terms of the section are in other respects strictly complied with, the court has no discretionary power to refuse the bankrupt's application for discharge.

[9 Chancery Division, 698.]

C.J.B., July 8, 1878.

Ex parte COCHRANE. In re SENDALL. [698]Practice—Time for appealing—Twenty-one Days from the Date of the Order—Bankruptcy Rules, 1870, r. 143—Rules of Court, 1875, Order LVIII, rr. 9, 15.*

In construing the 143d of the Bankruptcy Rules, 1870, the words "decision" and "order" mean the same thing; and the twenty-one days within which an appeal from a county court to the chief judge must be brought are to be reckoned from the date of the settling and signing of the order.

The decision in *Ex parte Garrard* (1) does not apply to the case of an appeal from a county court to the Chief Judge in Bankruptcy.

Ex parte Hinton (2) explained.

(1) 5 Ch. D., 61; 21 Eng. R., 792.

(2) Law Rep., 19 Eq., 266.

[9 Chancery Division, 701.]

C.J.B., July 29, 1878.

Ex parte CHESNEY. In re DEMPSTER. [701]Liquidation—Discharge of Debtor—Jurisdiction of Court—Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), s. 125, sub-se. 9, 10—Bankruptcy Rules, 1870, r. 802.*

The creditors of a liquidating debtor resolved that his discharge should be granted "on the certificate of the committee of inspection that he is entitled thereto." When the estate had been realized the committee refused to give the certificate. They alleged that the debtor had paid £5 to induce a person not to bid at a sale of his book debts by auction. The debtor did not deny this:

Held (reversing the decision of the county court), that the court had no jurisdiction to order the Registrar to sign a certificate of the debtor's discharge.

Ex parte Royle (1) explained.

(1) 26 W. R., 216.

[9 Chancery Division, 704.]

C.J.B., Aug. 5, 1878.

Ex parte TURQUAND. In re SHEPHERD. [704]Felony—Theft of Money—Imputation of Attempt to Compound Felony—Effect of Evidence—Admission to Proof of Sum equal to the Amount Stolen.*

The bankrupt, who was a banker's clerk, having absconded on the 16th of March, 1877, defalcations to the extent of a few hundred pounds were being discovered, when on the 24th of the same month the bankers received from the bankrupt a letter confessing thefts to the amount of £7,852 19s. Instructions were given on the 26th, in consequence of which a warrant for his apprehension was, on the 28th, placed in the hands of a detective, who failed to find him in England.

Conversations on the 19th, and again on the 22d of March, between a partner of the bank and relatives of the bankrupt, were deposed to. In the course of the former the partner said, "My advice is, that he should get out of the country to America, or elsewhere;" and on the latter occasion an offer having been made by the bank-

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Ex parte Isaacs. In re Baum. (No. 2.)

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rupt's wife that the bankrupt should return and throw himself on the mercy of the bank, the partner said, "No, if he did that, we should be obliged to prosecute him; if he were abroad, I don't suppose we should trouble further for him." It was also in evidence that after the conversation on the 19th, one of the relatives who was 705] present had *an interview with the bankrupt in this country, since which he had disappeared.

The Registrar of the county court having refused to admit to proof a claim of the bankers for the sum of £7,852 19s. :

Held, that there was not proof of such negligence on the part of the bankers to bring the criminal to justice as disentitled them to prove for the amount stolen; and appeal allowed.

[10 Chancery Division, 1.]

C.A., Nov. 14, 1878.

1] **Ex parte* ISAACS. *In re* BAUM. (No. 2.)

Practice—Appeal—Failure to give Security for Costs—Motion to dismiss for want of Prosecution—Costs of Motion.

On the 26th of June an appellant in bankruptcy was ordered to give additional security for the costs of the appeal. On the 4th of November, the security not having been given, the respondents' solicitor, without having previously written to the appellant's solicitors, gave notice of motion to dismiss the appeal for want of prosecution. On the 18th of November the additional security was given, and on the 14th of November the motion to dismiss came on to be heard :

Held, that the appellant must pay the costs of the motion, and that the appeal could not be heard until he had done so.

APPEALS from two decisions of Mr. Registrar Murray, acting as Chief Judge in Bankruptcy, having been presented by the trustee in the liquidation of John Baum, and the usual deposit of £20 having been made in each case, the Court of Appeal on the 26th of June, 1878, on the applica- 2] tion of the respondents, ordered that *the deposit in each case should be increased to £70, and that the proceedings should be stayed until the additional deposit had been made⁽¹⁾. On the 2d of November, 1878, the additional deposit not having been made, the Court of Appeal, on the application of the respondents, ordered that the appeals should be placed in the paper on the first day appointed for the hearing of bankruptcy appeals, with a view to the respondents moving to dismiss the appeals for want of prosecution. At this time the 7th of November had been appointed as the first day for the hearing of bankruptcy appeals, but on the 4th of November notice was given by the court that bankruptcy appeals would not be heard until the 14th of November. On the 4th of November the respondents served the appellant with notice of a motion, to be made on the 7th of November, or on the first day on

⁽¹⁾ 9 Ch. D., 271.

which the court should sit in bankruptcy, to dismiss the appeals respectively for want of prosecution, with costs of the motion and of the appeals. On the 13th of November the appellant made the additional deposit of £50 in each case, and gave the respondents' solicitors notice that he had done so. The respondents' solicitors replied that they should bring on the motion on the question of costs, inasmuch as all the costs of the motion had been already incurred.

The motion now came on to be heard.

E. C. Willis, and *Herbert Reed*, for the respondents: The appellant ought to pay the costs of the motion, which has been rendered necessary by his own unreasonable delay.

Swanston, Q.C., and *Nicholson*, for the trustee: The appeal is really brought by the creditors, and it was necessary to summon meetings to consider whether money should be raised to pay the increased deposit. The hearing of the appeals has not been delayed, for this is the first day since the long vacation on which they could have been heard. Before serving the notice of this motion the respondents ought to have written a letter to the appellant's solicitors. By not doing this unnecessary costs have been incurred.

*JAMES, L.J.: I think that the respondents were fully [3 justified in giving this notice of motion. There had been great delay in paying the money, and they took that step which the practice of the court entitled them to take. The appellant, on receiving the notice, ought to have paid the money at once, and to have tendered the respondents 20s. for the costs of their notice of motion. The appellants must pay the costs of the motion, and they must be paid before the appeal can come on to be heard.

BAGGALLAY and THESIGER, L.JJ., concurred.

Solicitor for respondents: *W. H. Roberts*.

Solicitors for appellant: *Evans & Eagles*.

[10 Chancery Division, 8.]

C.J.B., July 8: C.A., Nov. 14; Dec. 5, 1878.

Ex parte LEAROYD. *In re* FOULDS.

Adjudication of Bankruptcy—Rights of Third Person—Act of Bankruptcy—Relation back of Trustee's Title—Bill of Sale Holder—Appeal—"Person aggrieved"—Limit of Time for appealing—Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), ss. 8, 10, 11, 71—Bankruptcy Rules, 1870, r. 143.

By virtue of sects. 10 and 11 of the Bankruptcy Act, 1869, an adjudication of bankruptcy is, so long as it stands, conclusive as against a third person; e.g., the holder of a bill of sale executed by the bankrupt, that the act of bankruptcy, on which the adjudication was professedly founded, was in fact committed, and that the title of the trustee relates back to that act of bankruptcy.

But a third person, whose title to property is affected by the adjudication, is under sect. 71 a "person aggrieved" by it, and is entitled to appeal from it.

Whether the limit of twenty-one days for bringing an appeal, fixed by rule 143 of the Bankruptcy Rules, 1870, applies to a third person, *quære*.

Decision of Bacon, C.J., reversed.

Leave was given to appeal to the House of Lords.

THIS was an appeal from a decision of the Chief Judge in Bankruptcy.

On the 30th of August, 1877, Joseph Foulds, a tailor at Halifax, executed in favor of George Payne a bill of sale of his household furniture, stock-in-trade, and other effects, by 4] way of security for *the payment of a sum of £60 advanced to him by Payne, and £20 as consideration for the advance. The bill of sale was not registered. The goods remained in the apparent possession of the mortgagor until the 1st of January, 1878, when Payne removed them. On the 3d of January, 1878, a bankruptcy petition was presented against Foulds in the Halifax County Court by a creditor named Blakey. The petition alleged that Foulds had committed an act of bankruptcy, inasmuch as he, being a trader, departed from his dwelling house on the 31st of December, 1877, with intent to defeat or delay his creditors. On the 3d of January an order of adjudication was made on the petition, the order stating that it was made "upon proof satisfactory to the court of the debt of the petitioner, of the trading, and of the act of bankruptcy alleged to have been committed" by the debtor, and the order was afterwards advertised in the usual way in the *London Gazette*. On the 8th of January the goods removed by Payne were sold on his behalf. The trustees in the bankruptcy claimed the proceeds of the sale, and on their application the judge of the county court, on the 22d of May, 1878, ordered the

money to be paid to them. Payne appealed to the Chief Judge.

The appeal was heard on the 8th of July, 1878.

Winslow, Q.C., and *Finlay Knight*, for the appellant: The evidence shows that the debtor did not in fact depart from his dwelling house on the 31st of December with intent to defeat or delay his creditors.

[They were stopped by the court.]

E. C. Willis, for the trustees: Sections 10 and 11 of the act show that a bill of sale holder is conclusively bound by the adjudication so long as it stands, and cannot dispute that the act of bankruptcy on which the adjudication proceeded was in fact committed. He could appeal from the adjudication: *Ex parte Ellis* (').

BACON, C.J.: In this case an adjudication has been made; it is an official act, *which, unless and until reversed, [5 must have its full effect. If anybody wants to upset the adjudication, he must proceed to do so in the regular way. But that is not the position of the present appellant. He does not dispute the adjudication. He admits it, and says, "Well and good, I don't dispute the adjudication, but you must prove that there was an act of bankruptcy before I took possession." Of such an act of bankruptcy having been committed, there is, in my opinion, not a particle of evidence. It may be that such an act was committed, but upon the evidence I have not the slightest reason to believe that it was.

I look upon the case as one wholly undefended.

The appeal must be allowed, and the appellant is entitled to his costs.

From this decision the trustees appealed. The appeal was heard on the 14th of November, 1878.

E. C. Willis, for the trustees: Sect. 10 (' of the Bank-

(') 2 Ch. D., 797; 17 Eng. Rep., 731.

(') Sect. 10: "A copy of an order of the court adjudging the debtor to be bankrupt shall be published in the *London Gazette*, and shall be advertised locally in such manner (if any) as may be prescribed, and the date of such order shall be the date of the adjudication for the purposes of this act, and the production of a copy of the *Gazette* containing such order as aforesaid shall be conclusive evidence in all legal proceedings of the debtor having been duly adjudged a bankrupt, and of the date of the adjudication."

Sect. 11: "The bankruptcy of a debtor shall be deemed to have relation back to and to commence at the time of the act of bankruptcy being completed on which the order is made adjudging him to be bankrupt; or if the bankrupt is proved to have committed more acts of bankruptcy than one, to have relation back to and to commence at the time of the first of the acts of bankruptcy that may be proved to have been committed by the bankrupt within twelve months next preceding the order of adjudication; but the bankruptcy shall not relate to any prior

ruptcy Act, 1869, makes the advertisement in the *Gazette* conclusive on third persons that the adjudication was duly made, which it could not have been unless the act of bankruptcy on which it professed to be founded was in fact committed. By sect. 8, at the hearing of the petition the court [6] is to *require proof of the act of bankruptcy, as well as of the debt of the petitioning creditor, and of the trading (if necessary), and "if satisfied with such proof, shall adjudge the debtor to be bankrupt." A bill of sale holder whose title is affected by the adjudication is a "person aggrieved" by the order within the meaning of sect. 71, and is entitled therefore to appeal from it: *Ex parte Ellis* ('). But, so long as the adjudication stands, it is conclusive on every one that the act of bankruptcy on which it is founded was committed, and then, by sect. 11, the trustee's title relates back to that act of bankruptcy.

Winslow, Q.C., and *Finlay Knight*, for the bill of sale holder: The adjudication is made behind the back of the bill of sale holder; it could not have been intended that he should be unable to dispute the act of bankruptcy on which it is professedly founded. By rule 143 of the Bankruptcy Rules, 1870, an appeal must be brought within twenty-one days, and a stranger might not know of the adjudication for months after it was made. The advertisement in the *Gazette* does not state the act of bankruptcy.

[JAMES, L.J.: Possibly the limit of time for appealing applies only to the parties to the order. We have allowed cross appeals to be presented after the expiration of the twenty-one days, as in *Ex parte Hayward* (').]

A third person may be conclusively bound by the adjudication, but it does not follow that he is bound by all the alleged requisites to the making of it. The debts of petitioning creditors have been constantly disputed after an adjudication, and have been disallowed or altered in amount. In bankruptcy the court has constantly gone behind a judgment. In *Revell v. Blake* (') it was held that an adjudication made by a county court was conclusive that that court had jurisdiction over the debtor, but, though the adjudication was founded on non-compliance with the requirements of a debtor's summons issued against the debtor as a non-

act of bankruptcy, unless it be that at the time of committing such prior act the bankrupt was indebted to some creditor or creditors in a sum or sums sufficient to support a petition in bankruptcy, and unless such debt or debts are still remaining due at the time of the adjudication."

(¹) 2 Ch. D., 797; 17 Eng. Rep., 731.

(²) Law Rep., 6 Ch., 546.

(³) Law Rep., 7 C. P., 300; Ibid, 8 C. P., 533; 6 Eng. Rep., 236.

trader, it was held that the trustee was at liberty to prove that the debtor was in fact a trader. The present application was made by the *trustee against the respondent; [7 why should the respondent have to make another application of his own to annul the adjudication? For that purpose he would have to serve the bankrupt, who, as well as the other creditors, may be quite content with the adjudication. And, if the adjudication was annulled, all the proceedings which have been taken under it would be rendered void. Dividends may have been paid, and they would have to be recalled. Under the former Bankruptcy Acts it was always held that strangers were not affected.]

[BAGGALLAY, L.J., referred to sects. 233, 234, and 235 of the Bankruptcy Act of 1849, 12 & 13 Vict. c. 106 (').]

Sect. 11 is conclusive only that the trustee is trustee of the bankrupt's estate. The question is whether this property forms part of the estate, and when the trustee seeks to affect the rights of a third person the *onus* is on him to prove the act of bankruptcy on which he relies. The words of sects. 10 and 11 are not strong enough to alter the old law as regards third persons.

JAMES, L.J.: I cannot see how to escape from the plain words of sects. 10 and 11 of the act. It is said that inconvenience and hardship will result from putting a literal construction upon them. If there is any hardship which is not sufficiently met by the provisions of *sect. 71 and the [8 decision of this court in *Ex parte Ellis*(¹), that is a matter to be dealt with by the Legislature, who are about to try their hands on another amendment of the bankruptcy law. It is material to consider the history of these sections. According to my recollection, it was formerly open to any one,

(¹) Sect. 233: "If the bankrupt shall not" (within a specified time) "have commenced an action, suit, or other proceeding to dispute or annul the fiat, or the petition for adjudication, and shall not have prosecuted the same with due diligence and with effect, the *Gazette* containing such advertisement shall be conclusive evidence in all cases as against such bankrupt, and in all actions at law or suits in equity brought by the assignees for any debt or demand for which such bankrupt might have sustained any action or suit had he not been adjudged bankrupt, that such person so adjudged bankrupt became a bankrupt before the date and

suing forth of such fiat, or before the date and filing of the petition for adjudication, and that such fiat was sued forth, or such petition filed, on the day on which the same is stated in the *Gazette* to bear date."

Sections 234 and 235 enabled the other party or parties to actions or suits, other than those mentioned in sect. 233, brought by or against the assignees, to dispute the petitioning creditor's debt, the trading, or the act of bankruptcy, if he or they should have given notice in writing to the assignees before a specified time of his or their intention so to do.

(²) 2 Ch. D., 790; 17 Eng. R., 731.

even the bankrupt himself, to dispute the title of the assignee under the adjudication. That was thought to be an inconvenient state of things, considering what the effect of an adjudication of bankruptcy is on the *status* of the bankrupt, not only in this country, but also in other countries, by reason of international comity. It was very inconvenient that this *status* should be open to dispute over and over again. Then came the act of 1849, which provided that the adjudication was to be binding as against the bankrupt himself and any person who was bound to pay money either to him or his assignee. A person who was bound to pay money to the bankrupt could not allege that the title to it was not in the assignee. Then sects. 234 and 235 contained special provisions with regard to other third persons. That was the state of the law under the act of 1849, and it was not altered by the act of 1861. Then came the act of 1869, which is now in force. It swept away all those particular provisions, and substituted the one general provision which is contained in sect. 10. [His Lordship read sect. 10.] A man cannot be "duly" adjudged a bankrupt, unless the great requisite of all exists, that he has committed an act of bankruptcy. That is the capital offence of which he must have been guilty before he can be "duly" adjudged a bankrupt. That he has been "duly" adjudged a bankrupt, necessarily involves the previous commission of an act of bankruptcy. The mere fact that an adjudication has been made could have been proved without the aid of sect. 10. That section may, however, only involve this, that some act of bankruptcy had been committed before the adjudication was made. But then comes sect. 11, which has no operation at all as between the bankrupt and the trustee. The bankrupt has no rights whatever; all his rights have been transferred to the trustee. The mere fact that sect. 11 is dealing with the relation back of the trustee's title, shows that it is dealing with the rights of third persons, and not 9] merely with the rights of *the bankrupt and persons indebted to him. The adjudication in the present case is based on a particular act of bankruptcy which is alleged in the petition. [His Lordship referred to the form of the adjudication.] The act of bankruptcy alleged was that the bankrupt absented himself from his dwelling house on a particular day, with intent to defeat or delay his creditors, and by the adjudication it was conclusively settled that he had committed that act of bankruptcy. Then sect. 11 goes on to provide that, by way of enlargement of the trustee's title,

he may go behind the act of bankruptcy on which the adjudication was founded, and may, under certain circumstances and subject to certain limitations, prove that other earlier acts of bankruptcy have been committed, and if this is done the trustee's title is to relate back to the earliest act of bankruptcy which is proved to have been committed within twelve months before the adjudication. This, however, is to be proved by evidence, whereas the act of bankruptcy on which the adjudication is founded is proved by the production of the adjudication itself. It seems to me impossible to evade the words of these sections. The decision in *Revell v. Blake* (¹) was quite consistent with this view. There it was held that the adjudication itself was conclusive evidence that the court which made it had jurisdiction in the case, but that, where the adjudication was founded on an act of bankruptcy which could be committed equally whether the bankrupt was a trader or not, there was nothing in the act to prevent the trustee from showing that, though the bankrupt had been described as a non-trader, he was really a trader. I am of opinion, therefore, that we must reverse the decision of the Chief Judge.

BAGGALLAY, L.J.: I am of the same opinion, though I was at one period of the argument inclined to think that the decision of the Chief Judge was correct. But it seems to me impossible to evade the language of sects. 10 and 11. Sect. 10 says that the production of the advertisement of the adjudication is to be conclusive evidence "in all legal proceedings" of the debtor having been duly adjudged a bankrupt. At first sight one might think that reference was made *only to proceedings between the persons [10 who were parties to the proceedings in the Court of Bankruptcy. But if we refer to the provisions of the act of 1849, I think it was clearly the intention of the Legislature that sect. 10 of the present act should apply to all proceedings whatever. Sect. 233 of the act of 1849 is replaced by sect. 10 of the present act, which contains a general provision, applying to all legal proceedings, that the adjudication itself is to be conclusive evidence that it was duly made. If we go back to sect. 8, we find that before making an adjudication the court is to require proof of the act of bankruptcy alleged in the petition, and, if satisfied with the proof of that and the other requisites, shall adjudge the debtor to be bankrupt. If the matter rested here, I think we must take it that from the adjudication itself it is to be assumed that everything requisite to the making of it was

(¹) Law Rep., 7 C. P., 300; Ibid, 8 C. P., 533; 6 Eng. R., 236.

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duly proved before it was made. But then comes sect. 11, which, I think, if more was needed, makes the adjudication conclusive on third persons that the act of bankruptcy on which it was founded was really committed. I confess it did at first seem to me unreasonable that a creditor who does not desire to dispute the adjudication itself should be put to the trouble and expense of taking proceedings to annul it. But in this case the very ground for sustaining the bill of sale would itself go to defeat the adjudication. On the whole, I am of opinion that the order of the Chief Judge must be discharged.

THESIGER, L.J.: The question in dispute is as to the time to which the title of the trustee in the bankruptcy properly and legally relates back. If it relates back to the 31st of December, it is admitted that the title of the trustee is good as against the holder of the bill of sale, he having taken no apparent possession of the property until the 1st of January. I am of opinion that we are bound by the terms of the act of 1869 to hold that the bankruptcy did commence on the 31st of December. The adjudication was made on the 3d of January, and it was made upon a petition which stated that the debtor, being a trader, departed from his dwelling house on the 31st of December with intent to defeat or delay his creditors.

That being the adjudication and the petition on which it [1] was *founded, we are placed in this position by sects. 10 and 11 of the act. By sect. 10 the adjudication is in "all legal proceedings," and therefore in a proceeding between the trustee and the holder of a bill of sale given by the bankrupt, to be conclusive evidence that the debtor was duly adjudged a bankrupt. We start, therefore, with this, that we are bound to hold conclusively that a "due" adjudication was made on the 3d of January. It must, therefore, have been founded upon a proper act of bankruptcy. Then sect. 11 goes still further, and it is important to compare it with the provisions contained in the prior bankruptcy acts. Sects. 234 and 235 enabled third persons to dispute the act of bankruptcy upon giving notice of their intention so to do. That provision is swept away by the act of 1869, and in language clear and distinct the Legislature has said by sect. 11 that "the bankruptcy of a debtor shall be deemed to have relation back to and to commence at the time of the act of bankruptcy being completed on which the order is made adjudging him to be bankrupt."

It has been suggested that this does not relate to outsiders. If it does not, it has not been pointed out to whom

it does relate, nor how, if we are not to construe the words literally, we are to construe them. But the latter part of the section shows clearly that it must relate to outsiders, for it shows that it refers to any case of a dispute between the trustee and a person against whom there may be a claim on behalf of the bankrupt's estate. The section also in terms makes a distinction between the act of bankruptcy on which the adjudication is founded and any other act of bankruptcy to which it is attempted to carry back the trustee's title. In the first case, the trustee's title is to be deemed to relate back; in the other, it is to relate back upon proof of the commission of the act of bankruptcy. The Legislature, for the general convenience of the administration of the bankrupt's estate, has fixed a *datum* line for the commencement of the trustee's title—viz., the act of bankruptcy on which the adjudication is founded, leaving it open to the trustee to prove, if he can, earlier acts of bankruptcy. No doubt a certain amount of hardship will result from this construction. But the answer to that is, that it is open to any person aggrieved by the adjudication to apply to the *court to annul it. And there is this [12 further answer, that in the administration of bankruptcy the interests of individual creditors have to bow to the interests of the general body of creditors, and we must, therefore expect to find some cases of hardship.

Appeal allowed with costs.

Dec. 5. *Winslow*, Q.C. for the bill of sale holder, applied *ex parte* for leave to appeal to the House of Lords.

JAMES, L.J.: The question is one of very great importance, as well as one of difficulty, though I cannot say that I feel much doubt about it. You may take leave to appeal, but the petition must be lodged within a month.

BAGGALLAY and THESIGER, L.JJ., concurred.

Solicitors for appellants: *Bower & Cotton*, agents for F. Jubb, Halifax.

Solicitors for respondent: *Layton & Jaques*, agents for Holroyde & Smith, Halifax.

[10 Chancery Division, 13.]

M.R., Nov. 4, 1878.

13]

*FINNEY v. GRICE.

[1875 F. 26a.]

Will—"Household Furniture"—Leasehold House—Tenant's Fixtures.

As a general rule, a bequest of "household furniture" will not pass the tenant's fixtures in a leasehold house occupied by the testator.

FURTHER CONSIDERATION. The action was for the administration of the estate of Joseph Brindley, deceased, who by his will, made in 1865, gave and bequeathed to his wife all his "household furniture, plate, linen, and china articles and things, except stock-in-trade, money, securities for money, books of account, and manuscripts; and also all my household consumable stores that may be within my dwelling house at the time of my decease, for her own absolute use and benefit." And he devised and bequeathed his residuary real and personal estate, including leaseholds, to trustees in trust for sale.

At the time of his death the testator was residing in a leasehold house at Eltham, which contained numerous articles belonging to him of the class usually considered tenant's fixtures, such as gaseliers, gas-brackets, warming apparatus, slate-shelving, and a slate sink standing on cantilevers fixed into the wall.

The house was sold by auction under an order of the court in the action; but shortly after the sale the widow removed and sold the tenant's fixtures above mentioned, on the assumption that she was entitled to them under the gift of the testator's "furniture." An order was then made allowing the purchaser of the house the sum of £115 out of the testator's estate as compensation for the articles removed by the widow; but it was contended, on the part of the trustees and executors of the will, that this sum should be repaid by the widow, on the ground that the articles in question did not pass under the word "furniture."

Chitty, Q.C., and *Phear*, for the trustees and executors.

Romer, for the widow: *Paton v. Sheppard* (1) is a distinct authority that, under a *bequest of "household furniture," fixtures belonging to the testator in a leasehold house occupied by him will pass. And in *Kelly v. Powell* (2), referred to in a note to that case (3), "household

(1) 10 Sim., 186.

(2) Amb., 605.

(3) 10 Sim., 192.

furniture" is said to comprise everything that contributes to the use or convenience of the householder, or ornament of the house. At all events, such articles as gaseliers and gas-brackets will pass.

[JESSEL, M.R., referred to *Birch v. Dawson* (').]

Ince, Q.C., *Simmonds*, and *A. C. Cherry*, for other parties.

JESSEL, M.R.: I dissent most emphatically from the proposition that where the owner of a leasehold house containing tenant's fixtures bequeaths the house to A. and the "furniture" to B., that entitles B. to remove the mantelpieces, stoves, kitchen dressers and shelves, and articles of that kind.

In my opinion it is clear that whether you regard the ordinary use of language or the technicalities of the law relating to fixtures, such articles do not pass under the word "furniture."

The occupier of the house, as lessee, is as much entitled to the tenant's fixtures as to the house, but no further; though he has this right—the right during the term of taking the fixtures away or selling them to the freeholder; but after the term has expired, he is not entitled to take them, for they are no longer his property.

In no sense does the word "furniture" include such articles as I have mentioned.

I guard myself from saying that there may not be special circumstances in any particular case—and there were special circumstances in *Paton v. Sheppard* (')—which would entitle the court to say that the owner of the house and fixtures did intend the fixtures to pass under the word "furniture;" and I do not say but that the boundary line may sometimes be so fine that the court may hold that articles which are, strictly speaking, tenant's fixtures, are so nearly like furniture that they will pass under the word [15 "furniture;" but it may be stated as a general rule that the word "furniture" will not pass tenant's fixtures.

In this particular case, as there appear to be some articles included in the valuation to which the widow would be entitled as "furniture," and to save the expense of a reference to chambers, I shall order the widow to repay one-half of the £115.

Solicitors: *Plaskitt*, agent for S. Smoothery, Braintree; *Cronin & Rivolta*; *Foss & Legg*, agents for F. R. T. Bloxam, Eltham.

(') 2 A. & E., 87.

(') 10 Sim., 186.

See 2 Jarman on Wills (Randolph & Talcott's edition), 361, top paging.

Pictures, statues and curiosities may pass under a bequest of "household goods and household furniture": *Dayton v. Tillou*, 1 Rob., 21.

Silver plate used at hotel held not to: *Dayton v. Tillou*, 1 Rob., 21.

Though plate used in the family would pass: *Burns v. Winthrop*, 1 Johns. Chy., 329.

Bronzes, statuary and pictures in use in a house pass under the term "household furniture": *Richardson v. Hall*, 124 Mass., 228, 237-8.

The term "household furniture," though not susceptible of strict definition, has acquired a definite meaning, by which it is understood to include everything which may contribute to the use or convenience of the householder, or the ornament of the house, such as plate, linen, china, pictures, etc.

Where a testator, by his will, bequeathed to A. "all his library and household furniture of every description, and any other personal property not thereafter specifically devised," and by a subsequent clause devised to B. "all his real estate and personal property which he may acquire after the date of the will," and again to B. "all the rest and residue of his real and personal estate, not thereinbefore devised:" Held, that a portrait of the testator, painted after the making of the will and at the time of his death, still in possession of the artist in another city, passed to A. under the devise of "household furniture."

By the law of Ohio, "family pictures" are exempt from execution, but, per *Storer, J.*, this exemption would not extend to the private gallery of a connoisseur, nor to costly pictures the

subject of which are not connected with the family in whose possession they are found: *M'Micken v. M'Micken*, 2 Am. Law Reg. (N.S.), 489, Supr. Court of Cincinnati.

Goods at a testator's home, where he eats, sleeps and lives, are his household effects, unless he keeps them for traffic or merchandise.

A bequest of "household furniture" will pass the beds, etc., used by a testatrix, who kept a boarding school, for the use of her boarding scholars.

Words of a will in their ordinary legal signification are taken to express the testator's intention, unless there be something either in the will or circumstances *de hors* to indicate that they were used in a different sense.

"Household furniture," in the will of a boarding house keeper, includes what is used for the comfort and convenience of the boarders, as well as that used by members of the family or guests entertained without pay.

"Household furniture" being articles of trade of a cabinet maker, etc., would not pass by these words, though his residence might be in the same building with his store. And so of a hotel keeper living in a different house.

The desks and other furniture of a school room will not pass by "household furniture," although the school room is in the residence of the school keeper: *Hooper's Appeal*, 60 Penn. St. R., 220.

A watch which the testator has been in the habit of carrying on his person does not pass by a bequest of his "wearing apparel;" nor by a bequest of his "household furniture;" though a watch kept hung up in the house might be considered as household furniture: *Gooch v. Gooch*, 33 Maine, 535.

[10 Chancery Division, 15.]

M.R., Nov. 6, 1878.

GENERAL FINANCE, MORTGAGE, AND DISCOUNT COMPANY
V. LIBERATOR PERMANENT BENEFIT BUILDING SOCIETY.

[1878 G. 71.]

Dead—Estoppel—Mortgage—Grant—Covenants for Title—Averment of Legal Estate.

The covenants for title in a mortgage of a freehold estate, whether read in connection with the word "grant" or not, do not amount to that precise averment that the mortgagor is seized of the legal estate which is necessary to create an estoppel as against him and persons claiming under him.

A., by deed, purported to grant a freehold estate to B. by way of mortgage. The deed contained no recitals, but there were the usual mortgagor's covenants for title, including a covenant that the mortgagor "had power to grant the premises in manner aforesaid."

The mortgage was accepted by B. on the faith of certain forged title deeds produced and handed to him by A. At the date of the mortgage A. had not the legal estate nor any interest whatever in the property. Subsequently, however, A. acquired the legal estate and mortgaged it to C.:

Held, that, inasmuch as the mortgage to B. contained no precise averment that A. was seized of the legal estate, no estoppel had been created in favor of B. as against C.

SPECIAL CASE, stated for the opinion of the court under Rules of Court, 1875, Order xxxiv, rule 1.

The action had been brought by the plaintiffs against the defendants to recover possession of certain freehold lands in the parish of Cumberwell, and also (by special leave) to recover possession of the title deeds relating thereto.

*The facts, as stated in the special case, were to the [16 following effect:—

By an indenture dated the 21st of December, 1872, the lands in question were conveyed to John Woodbine White in fee simple.

By an indenture dated the 23d of December, 1872, White mortgaged the property to Risdon, Templeton and Clifford, in fee simple to secure £800 and interest.

By an indenture dated the 14th of May, 1873, and made between Edward Downs of the one part, and the plaintiffs of the other part, Downs purported to grant and convey the same property to the plaintiffs in fee simple, by way of mortgage to secure £800 and interest. This mortgage deed contained no recitals, but there were the usual mortgagor's covenants for title, including a covenant that the mortgagor "had full power to grant and convey the said premises in manner aforesaid."

Prior to the execution of this mortgage Downs produced

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to the plaintiffs two documents purporting to be the title deeds under which he claimed to be the absolute owner in fee simple of the property; and these two deeds were, upon the execution of the mortgage, handed by Downs to the plaintiffs, and were now in their possession.

It was, however, afterwards discovered that these deeds were forgeries, and that at the date of the mortgage of the 14th of May, 1873, Downs had not the legal estate, nor any interest whatever in the property in question.

By an indenture dated the 20th of May, 1873, and made between Risdon, Templeton, and Clifford of the first part, White of the second part, and Downs of the third part, the property was conveyed, by way of sale, to Downs in fee simple discharged from the mortgage of the 23d of December, 1872; and then, by another indenture of the same date and made between Downs of the one part, and the defendants of the other part, Downs mortgaged the property to the defendants to secure moneys which had been advanced by them to enable him to complete his purchase.

The defendants had not at the time of such advance or mortgage any notice of the prior mortgage by Downs to the plaintiffs.

By virtue of their mortgage the defendants were now in possession of the property, and also of the genuine title [17] deeds, *consisting of the original conveyance to White of the 21st of December, 1872, the mortgage by him of the 23d of December, 1872, and the conveyance by him and his mortgagees to Downs of the 20th of May, 1873.

The mortgage debts under both the plaintiffs' and the defendants' mortgages being still unpaid, the question arose which mortgage was entitled to priority.

On the one hand, the plaintiffs contended that by virtue of their mortgage and the subsequent conveyance to Downs of the 20th of May, 1873, the legal estate was vested in them, and that they were accordingly entitled as mortgagees to the possession of the property and the genuine title deeds.

On the other hand, the defendants contended that by virtue of the title deeds in their hands and their mortgage deed they were seised of the legal estate, and were entitled to possession.

The following questions of law were accordingly submitted by both parties for the opinion of the court:—

(1.) Whether the defendants were entitled to the property in priority to the plaintiffs in respect of the moneys due and secured by virtue of the mortgage of the 20th of

May, 1873; and (2.) Whether the defendants were bound to deliver up possession of the property and title deeds to the plaintiffs.

Chitty, Q.C., and Farwell, for the plaintiffs: We claim to have a title by estoppel; that is to say, although at the time Downs executed his mortgage to us he had no legal estate, he—and all persons claiming under him—became, by virtue of that mortgage, estopped from denying that he had the legal estate; and the estoppel so created was “fed” by the legal estate which he afterward acquired under the conveyance to him from White and his mortgagees, so that the legal estate thus became complete.

The doctrine of estoppel—which Lord Coke, in discussing it, describes as “an excellent and curious kinde of learning” (¹)—rests, when applied to a “deed indented”—such as a deed of grant—upon a clear and precise averment of title; the question considered in most of the cases upon the subject being to what extent recitals constitute such [18 an averment as will operate as an estoppel. It now appears to be settled law that a general recital will not operate as an estoppel, but that the recital of a particular fact will have that effect, *Bensley v. Burdon* (²); *Sugden’s Vendors and Purchasers* (³); *Right v. Bucknell* (⁴); though in the former case Sir John Leach seems to have been of opinion that a simple conveyance by lease and release was in itself sufficient to create an estoppel.

The defendants will probably rely on the recent case of *Heath v. Crealock* (⁵), where, on an ordinary conveyance to a purchaser in fee, a recital that the vendor was seised “or otherwise well and sufficiently entitled in fee simple,” was held not to constitute that precise or unambiguous averment which the doctrine of estoppel requires. In the present case—which is that of a mortgage, not a simple conveyance—we admit we have no recital at all, but we have the usual mortgagor’s absolute covenants for title; and we rely in particular upon the covenant that the mortgagor “has full power to grant and convey the said premises in manner aforesaid,” which, we submit, is tantamount to an averment that the mortgagor is absolutely seized in fee, a recital of which fact would, according to Lord Cairns’ judgment in *Heath v. Crealock*, be sufficient to create an estoppel.

(¹) Butl. Co. Litt., 352 a.

(²) 2 S. & S., 519; 8 L. J. (Ch.), 85.

(³) 14th ed., p. 739 n.

(⁴) 2 B. & Ad., 278.

(⁵) Law Rep., 10 Ch., 22; 11 Eng. R., 416.

[JESSEL, M.R.: Can you produce any authority for the proposition that an estoppel can be created by covenant?]

We have not been able to find any direct decision upon the point in the books or in any of the cases on estoppel collected in Dart's Vendors and Purchasers ('); but there is authority that, in order to ascertain whether a deed contains a sufficient averment of title, you must look at the whole deed and not merely at one particular part of it.

In *Crofts v. Middleton* ('), Lord Hatherley, when Vice-Chancellor, said the question in such cases is whether there is, upon the whole deed, any distinct averment of the grantor's title, "either by recital or in any other way." It appears to be now well established that a "grant" or [19] release" alone is not such an averment, but *that a "demise" is: *Crofts v. Middleton* ('). In Butl. Co. Litt. (') it is stated that the word "grant," standing alone, does not imply a warranty, but that the word "demise," as importing a covenant for quiet enjoyment, does imply a warranty, and therefore operates as an estoppel. The word "grant" has, at all events, this effect—that a grantor cannot dispute with his grantee his own title to what he has assumed to convey, *Doe v. Horne* ('); and if, as in the present case, a grant is coupled with covenants for title, more especially a mortgagor's absolute covenants, it is difficult to see—reasoning by analogy—why that should be less capable of constituting a sufficient averment or warranty than a demise. A covenant or obligation involves statements which the covenantor is estopped from denying: Vin. Abr., "Estoppel," (') referring to *Barwicke v. Gybson* ('). In *Goodtitle v. Bailey* ('), Lord Mansfield says, "If a man has made a solemn deed covenanting that another shall enjoy the premises, and likewise for further assurance, it shall never lie in his mouth to dispute the title of the party to whom he has so undertaken." And in *Bowman v. Taylor* ('), Justice Taunton lays it down as a principle "that where a man has entered into a solemn engagement by and under his hand and seal as to certain facts, he shall not be permitted to deny any matter which he has so asserted."

Surely, if A. conveys to B. for value, and covenants for title, this is, in effect, an assertion by A. that he has the property to sell: it is a representation which operates on an estoppel.

(1) 5th ed., p. 810.

(2) 2 K. & J., 194.

(3) 384 a. note.

(4) 3 Q. B., 766.

(5) P. 9; M. 8, XV.

(6) 3 Cro. Jac., 297.

(7) 2 Cowp., 597, 600.

(8) 2 A. & E., 278; 2 Sm. L. C., 7th ed., p. 846.

[JESSEL, M.R.: There must be a distinct and particular statement of A.'s title. The doctrine of estoppel, as applied to a case of this kind, is not founded on representation.] But here the covenant that the mortgagor has power to grant is absolute and unqualified, and when taken in conjunction with the grant necessarily implies, as we submit, a clear and distinct assertion that the grantor has the legal estate to grant.

Davey, Q.C., and *Chester*, for the defendants, were not called upon.

*JESSEL, M.R.: It is a very unpleasant thing to [20 have to decide a case of this kind without knowledge of the reasons for some of the distinctions which are established by the old cases; but fortunately, in this particular instance, I have modern authority which, in my opinion, is conclusive upon the subject, and therefore I am not going through those ancient decisions, to a portion of which only I have been referred, although there are a good many more which, I dare say, the counsel engaged in this case are well acquainted with.

The real question in this case arises upon the contents of a deed. A Mr. Downs went to the plaintiffs with two forged deeds, purporting to show his title to certain property, and borrowed some money from them upon a mortgage of that property. He afterwards got the defendants to advance him the money wherewith to buy the property, and the defendants unluckily did what no prudent mortgagees should ever do, that is, they allowed the then owner of the legal estate to convey to Downs and then took a mortgage direct from him. As I have said, no mortgagee should ever allow the legal estate to get into his mortgagor's possession.

However, the defendants did so, and the mortgage to them being dated the same day as the conveyance to Downs, the result was that for a moment the legal estate was in Downs.

The plaintiffs say that that was no fault of theirs; but the following point arises between two innocent parties who were in fact cheated; no fault can be shown to exist as against one more than as against the other. The plaintiffs say that by reason of something in the mortgage to them there was an estoppel as against Downs and the persons claiming under him, and that that estoppel became filled or supplied by the momentary conveyance to Downs, which, in other words, fed the estoppel and thereby vested the legal estate by estoppel in the plaintiffs; and that is the question I have now to decide.

Now this question depends upon decision, that is to say,

upon authority. The whole doctrine of estoppel of this kind, which is a fictitious statement treated as true, might have been founded in reason, but I am not sure that it was. There is another kind of estoppel—estoppel by representation—which is founded upon reason, and it is founded upon 21] decision also. It is quite plain that *it is not every representation that will do for an estoppel, and it is not every statement that will do. In order to find out what sort of statement will do, you must have recourse to authority; and, as far as I am concerned, I shall treat the authorities as binding and conclusive, for I am not going to inquire how they came to be decided in the way they were: there they are.

The first case I am going to refer to is a very modern case, and so indeed is another. The first case is that of *Heath v. Crealock*, where the Lord Chancellor, Lord Cairns, says this ('): "Now, in my opinion, that argument" (that is, the argument as to estoppel) "was founded altogether upon a fallacy. There is no estoppel whatever in this case. The conveyances to the purchasers were innocent. They were ordinary conveyances by grant; the operative words of which, as is well known, would create no estoppel." It was then well known, but whether it was well known at all times is another question, because Sir John Leach had decided the contrary; but in 1874 it was well known, because the point had been considered long before; there had been a decision in 1831 by Lord Tenterden who held the same view as Lord Cairns.

The Lord Chancellor goes on to say, "and the estoppel, if it arose at all, would arise by virtue of the first recital in the conveyance."

Now this shows that the grant, though it would amount in equity to a representation, does not amount in law to a representation that the man has a right to grant. It is very odd that it should be so, but it is so, and that is all that one can say about it. If a man chose for money to grant an estate to A., or agreed to mortgage it to him, it would certainly have been held in equity that he represented he had an estate to sell or mortgage. But that is not so at law as regards estoppel.

His Lordship goes on, "The recital was in substance the ordinary one in such cases. It recited that Stephens was seised or otherwise well and sufficiently entitled to the property in question, free from incumbrances." What does "well and sufficiently entitled" mean? A man cannot be

(') Law Rep., 10 Ch., 30; 11 Eng. Rep., 416.

"well and sufficiently entitled" except he is the owner; but it is said that he is "well and sufficiently entitled" if he is equitable owner, and that is important.

*His Lordship then proceeds, "If the recital had [22 been a recital simply that Stephens was seised, there might have been an estoppel, but the recital is one out of which no estoppel can arise, because it is not precise or unambiguous. It is a recital which, in substance, amounts to a statement that he had an estate either at law or in equity, and the fact that it states that the estate, whatever it was, was free from incumbrances, creates no estoppel for the purpose of making the legal estate pass."

So that his Lordship construes the rule as strictly as that, namely, that a representation that a man is entitled to an estate free from incumbrances is not a representation that he has the legal estate. "There is, therefore, no estoppel operating so as to convey the legal estate to the purchasers."

Then Lord Justice James says that he is of the same opinion. Lord Justice Mellish says, "I agree with what has been laid down by the Lord Chancellor, that in this case there is no estoppel as to the legal estate alleged to have passed to the purchasers."

So that there is modern decision to show that, even in the case of recital, it must be a strict recital that the man has the legal estate; nothing less will do.

Then there is a case of *Crofts v. Middleton* (*), which was a decision by Vice-Chancellor Wood, who says that you must look at the deed to see—what? That there is the precise representation that the man has the legal estate. That is what you have to find from the deed—the precise representation.

To the same effect is the case of *Right v. Bucknell* (*), before Lord Tenterden, where he refers to a case of *Bensley v. Burdon*, which came before Sir John Leach, who decided—as it is now settled he was wrong in deciding—that a lease and release would operate as an estoppel without more, and that it does not matter whether the word is "release" or "grant." *Bensley v. Burdon* is, I find, reported on appeal in 8 L. J. (Ch.), 85, not in 5 Russ. Ch. Rep., as stated in the reporter's note to *Right v. Bucknell*. The Lord Chancellor Lyndhurst, it is there stated, affirmed Sir John Leach's judgment by holding that there was an estoppel, but put it upon this ground solely, that there was an allegation of a particular fact by which the party making it was concluded.

*What then does this deed convey? It has no reci- [23

(*) 2 K. & J. 194.

(*) 2 B. & Ad. 278.

tal at all. It is a common grant, which of course will not do, but the mortgagor thereby covenants with the mortgagee in the usual way, "that the mortgagor has full power to grant and convey the said premises in manner aforesaid;" and then there are other covenants which were not relied upon,—for instance that the mortgagor after default should quietly enjoy.

Now, it has been said that that covenant contains that precise statement which is necessary in order to support this kind of estoppel. In the first place, I am of opinion that there is no such precise statement in the covenant. The mortgagor has power to convey even if the legal estate is outstanding in a bare trustee. He can compel the trustee to come in and grant the estate, and in that way he really has the power to convey. He has power to call upon the trustee to convey to him and also to convey "in manner aforesaid." He has power to convey if he has the whole beneficial interest.

The words of the covenant can be fully complied with without his having a single atom of legal estate. He only covenants that he has the power to convey, and therefore it might be that he might have through the medium of the Statute of Uses a power only, and this without having any estate at all; or he might have a power under a will which would enable him to convey by bargain and sale irrespective of the Statute of Uses. Therefore, the assertion that he has a power to convey is not an assertion that he is seised in fee or that he has any legal estate whatever.

There are other cases which can be put which would undoubtedly comply with the words even if there had been a recital instead of there being merely a covenant. It appears to me therefore that, having regard to the decision of the Court of Appeal which I have mentioned, there is not in this case that precise, clear, and unambiguous statement that Downs was seised in fee or had the legal estate which is required by the law as settled by authority.

There is one other observation which I have to make upon the case, which is this. I am not prepared to decide that a covenant will do at all. As it is said in *Crofts v. Middleton* (1), you must *look to the effect of the deed. In the first place, no decided case has been produced in which it has been held that the covenant that a man has a thing shall be considered as equivalent to a positive statement that he has it; and therefore there is no authority in all the long line of cases which makes a covenant sufficient.

(1) 2 K. & J., 194.

It has been attempted to argue the point upon grounds of principle and analogy, which I am afraid have very little to do with this case; but if you were to adopt the principle of *Crofts v. Middleton* ('), namely, that you must look to the whole of the deed to see what its effect is, the result would simply be this: the covenant is an agreement that if the mortgagor has not the power to convey the legal estate he will be liable in damages; it is an agreement that he shall be treated as having it, and so be liable to an action if the statement turns out to be untrue: that is what it means. The covenant has no other meaning, it is not a mere assertion that he has the legal estate, but an agreement really that if he has it not, he will pay for it. It is a bargain that he has the power to convey; but not an assertion that he has the estate; and so it does not appear to me to be at all clear that that would amount to that precise averment of a fact which is necessary in order to support the doctrine that a subsequent conveyance of the legal estate will, so to say, fill up the estoppel previously created.

The last remark I think it necessary to make is this—that I see no reason for extending the doctrine. It can have no operation except in the case of third parties who are innocent of fraud and who have become owners for value; and there can be no reason—as I intimated at the beginning of my judgment—that I am aware of, for preferring one innocent purchaser for value to another. As against the man himself or persons claiming without value, the purchaser or the mortgagee can recover without any recourse to estoppel at all; therefore, considering especially that the jurisdiction in equity and common law is now vested in every court of justice, so that no action for ejectment or, as it is now called, an action for the recovery of land, can be defeated for the want of the legal estate where the plaintiff has the title to the possession, I think I ought not to attempt in any way to extend *this doctrine by which falsehood is made [25 to have the effect of truth. The doctrine appears no longer necessary in law; it appears no longer useful, and, in my opinion, should not be carried further than a judge is obliged to carry it.

Under these circumstances I decide both questions put to me by the special case in favor of the defendants.

Solicitors: *Boulton & Sons; H. G. Wright.*

(¹) 2 K. & J., 194.

See Rawle on Covenants for Title (4th ed.), 389 *et seq.* shall pass by an estoppel, it is necessary that the deed should contain cove-

In order that an after-acquired estate nants for title of some sort or kind:

1878 General Finance, &c., Co. v. Liberator, &c., Building Society. M.R.

Edwards v. Varick, 5 Den., 664; *Sparrow v. Kingman*, 1 N. Y., 242; *Kimmel v. Benna*, 10 Mo., 52; *Julian v. Boston*, etc., 128 Mass., 555.

The execution of a deed by a married woman does not estop her from enforcing a mortgage given to a third person by herself and husband on the same lands, and assigned to her, she not joining in any covenant in the deed: *Van Amburgh v. Kramer*, 16 Hun, 205.

See *Best v. Thiel*, 79 N. Y., 15.

A sale of lands on foreclosure conveys only the estate of which the mortgagor was seized at the time the mortgage was given, and if such mortgage contain no covenants of warranty, the lien of a second mortgage made after the mortgagor had acquired a fee simple is not affected by way of estoppel by the fact that the second mortgage was, as such, made by a party to the foreclosure of the first mortgage: *Smith v. De Russey*, 29 N. J. Eq., 407.

Under a deed with covenants of warranty, a title afterwards acquired by the grantor enures by way of estoppel to the grantee as against the grantor and his subsequent grantees: *House v. McCormick*, 57 N. Y., 810; *Rathbun v. Rathbun*, 6 Barb., 98; *Knight v. Thayer*, 125 Mass., 25; *Dalton v. Hamilton*, 50 Cal., 422; *Gibbs v. Thayer*, 6 Cush., 30; *Newcomb v. Presbrey*, 8 Met., 406; *Boulter v. Hamilton*, 15 U. C. Com. Pl., 125; *Featherston v. McDowell*, 15 U. C. Com. Pl., 162; *Ford v. Cain*, 16 U. C. Q. B., 516; *Doe v. McGill*, 2 U. C. Q. B., 483; *Broadwell v. Phillips*, 30 Ohio St. R., 255; *Weisner v. Zaun*, 39 Wisc., 188; *Bell v. Adams*, 81 N. C., 118; *Scoffins v. Grandshaff*, 12 Kans., 467; *Hitchcock v. Fortier*, 65 Ills., 239.

Where the grantor by deed of warranty, which at the time of the conveyance was defective, but afterwards acquired an indefeasible title, this title enured immediately to the grantee, and the latter could not elect to reject it and recover the consideration money paid in an action for breach of covenant of seisin, but was entitled only to compensation for whatever damages he had sustained: *Knowles v. Kennedy*, 82 Penn. St., 445.

Even though the last title were acquired after suit: *Boulter v. Hamilton*, 15 U. C. Com. Pl., 125.

If a party having the equitable title to land, and being entitled to the legal title, conveys the same by a quitclaim deed and subsequently acquires the legal title, it will enure to his grantee: *Welsh v. Dutton*, 79 Ills., 465.

Where one having no title to lands executes a mortgage thereon with covenants of seisin and of title, and afterwards acquires title, it enures to the benefit of the mortgagee; and the mortgagor and his privies in estate, in blood and in law, are estopped from questioning that, at the date of the mortgage, the mortgagor had title: *Tefft v. Munson*, 57 N. Y., 97, affirming 63 Barb., 32; *Byber v. Hageman*, 66 Ills., 519.

A record, therefore, of the mortgage prior to the acquisition of title by the mortgagor is constructive notice to a subsequent purchaser in good faith, and, under the recording act, gives it priority to his title: *Tefft v. Munson*, 57 N. Y., 97, affirming 63 Barb., 32; *Byber v. Hageman*, 66 Ills., 519, 521; *White v. Patten*, 24 Pick., 324.

See *Chicago v. Witt*, 75 Ills., 211; *Heaton v. Prather*, 84 Ills., 330; *Irish v. Sharp*, 89 Ills., 261; *Heffron v. Flanigan*, 37 Mich., 274; *Boyd v. Munderdorf*, 30 N. J. Eq., 645; *Dusenbury v. Hurlbert*, 59 N. Y., 541; *Lossey v. Simpson*, 11 N. J. Eq., 246; *Clark v. Brown*, 3 Allen, 509.

If a conveyance of the right, title and interest of the grantor contains a covenant of warranty of title, and the grantor at the date of the conveyance has no title, but afterwards acquires it, the covenant does not enlarge the estate conveyed, so that the title afterwards acquired by the grantor vests in the grantee: *Barrett v. Birg*, 50 Cal., 655; *Gee v. Moore*, 14 Cal., 472.

It seems that a deed, with full covenants of warranty, by one in possession as tenant by the curtesy, of "all the right, title, interest and estate in and to a certain parcel of land" described, "intending hereby to convey all the title or estate in the premises which was conveyed or passed to the grantor by a deed from" the co-heirs of his wife (and which he had in fact since reconveyed through a third person to her), warrants the title last mentioned.

If the English doctrine of rebutter by collateral warranty is part of the

law of Massachusetts, it is only as restricted by the St. of 4 & 5 Anne, c. 16, § 21.

A deed from a father, with full covenants of warranty, does not bar, estop or rebut his heirs, even to the extent of assets received by descent from him, to assert against the grantee an independent title derived by inheritance from their mother, unless perhaps when administration has been taken out upon his estate and a breach of the covenants occurs after his estate has been settled: *Russ v. Alpaugh*, 118 Mass., 369.

Although a grantor cannot set up a

hostile title existing at the time of his conveyance, because he is estopped by his covenant, yet if the deed be a mere quitclaim, without covenant or fraud, the grantor is not barred from subsequently acquiring and setting up any other title, whether existing at the time of his conveyance, or subsequently created.

A grantor may set up, as against his own deed, a title acquired by him by a contemporaneous or subsequent practical location with an adverse possession for the requisite length of time: *Cramer v. Benton*, 64 Barb., 522.

[10 Chancery Division, 25.]

M.R., Nov. 11, 1878.

ROGERS V. MUTCH.

[1874 R. 13.]

Will—Bequest to "Children of A. who shall attain twenty-one"—Separate Legacies—Time of Ascertaining Class—After-born Children.

Bequest of "the sum of £100 to each of the children of my niece M. who shall live to attain the age of twenty-one years."

The niece survived the testatrix, and was still living, but had not yet had any children:

Held,—applying the rule that, under a gift of a certain sum to each of a class of objects at a future period, objects born after the testator's death cannot be admitted,—that no child the niece might have could take under the bequest.

FURTHER CONSIDERATION. Elizabeth Hill, widow, by her will, dated the 3d of June, 1873, bequeathed "the sum of £100 to each of the children of my niece Eliza Mutch, who shall live to attain the age of twenty-one years."

The testatrix died on the 31st of October, 1873.

Eliza Mutch was still living, and she and her husband were defendants in this action, which was for the administration of the estate of the testatrix. Mrs. Mutch had not yet had any children. In distributing the estate the question arose whether any, and, if so, what amount should be set apart to answer the legacies to the "children" of Mrs. Mutch.

Locock Webb, Q.C., and *Yate Lee*, for the plaintiffs, the executors: The rule appears to be that, under a gift of a certain sum to each of a class of objects at a future period, no members of that class born after the death of the [26 testator can be admitted, otherwise the inconvenience would arise of having to postpone the distribution of the estate

until it could be ascertained how many legacies of the given amount would be payable: *Ringrose v. Bramham* ⁽¹⁾; *Mann v. Thompson* ⁽²⁾; *Storrs v. Benbow* ⁽³⁾; *Hawkins on Wills* ⁽⁴⁾. They also mentioned *Weld v. Bradbury* ⁽⁵⁾.

Chitty, Q.C., and *Jolliffe*, for the defendants, Mr. and Mrs. Mutch.

JESSEL, M. R.: As I understand the rule, its object is simply one of convenience. In the old case of *Ringrose v. Bramham*, the gift was of £50 to every child of Joseph Ringrose and Christopher Rhodes by their present wives who came of age, and the Master of the Rolls says this: "Here there are distinct legacies of £50 to each of the children, and therefore if I am to let in all the children of these two persons born at any future time, I must postpone the distribution of the testator's personal estate until the death of Joseph Ringrose and Christopher Rhodes, or their wives, for I can never divide the residue until I know how many legacies of £50 are payable." And he distinguishes the case of *Gilmore v. Severn* ⁽⁶⁾ by saying that in that case a gross sum of £350 was given to the children of Jane Gilmore, to be paid to them in equal shares at twenty-one, and that there was no inconvenience in postponing the vesting of those shares until some one of them attained that age, so as to let in the children born in the meantime, because there was nothing to do but to set apart the sum of £350, and the residue of the testator's personal estate might be immediately divided. So that the rule is a rule of convenience; unless you adopt it you cannot divide the estate.

In *Ringrose v. Bramham* there were children living at the death of the testator, but the same rule applies, where, as in the present case, there are no children living at the testator's death. If, in such a case, you are to let in children ²⁷ born after the death, *the estate is no more divisible in the one case than in the other; and so Lord Hatherley, when Vice-Chancellor, points out in *Mann v. Thompson* ⁽⁷⁾. He says this ⁽⁸⁾: "The next case is not a bequest of a sum to be divided among a class, but a gift of a certain sum to each individual of the class, where no time is fixed by the will at which the class is to be ascertained. I do not find any decided case in which the point has arisen, which occurs here with regard to children, who were neither *in esse* at the date of the will, nor at the testator's death."

⁽¹⁾ 2 Cox, 384.

⁽²⁾ Kay, 638.

⁽³⁾ 2 My. & K., 46; 3 D. M. & G., 390.

⁽⁴⁾ Page 73.

⁽⁵⁾ 2 Vern., 705.

⁽⁶⁾ 1 Bro. C. C., 582.

⁽⁷⁾ Kay, 642.

He then refers to *Ringrose v. Bramham* (¹), and says: "The reason which he (the Master of the Rolls) gave for excluding them the after-born children, seems to be very sound, namely, the extreme inconvenience of postponing the distribution of the testator's personal estate until all the children who might be born should be ascertained, which would not happen until the death of their respective parents."

The actual point in this case did not arise in *Ringrose v. Bramham*, but still the *ratio decidendi* clearly applies.

[His Lordship then read several other passages from the Vice-Chancellor's judgment (²), and continued:] It appears, therefore, that the Vice-Chancellor approves of the decision in *Ringrose v. Bramham*, and also of the reason for that decision, and would have applied it to the case before him but that the language of the will was sufficient to show the testator contemplated those children only who should be living at his death.

Then I find the rule is laid down in Mr. Hawkins' well-known and valuable book, where he says (³): "The rule which admits objects born after the testator's death and before the period of distribution, to share in the bequest, only applies where the total amount of the gift is independent of the number of objects among whom it is to be divided, and is therefore not increased by the construction adopted. But a gift of a certain sum to each of a class of objects at a future period is confined to those living at the testator's death." He then illustrates the rule by referring to the two authorities I have mentioned, and proceeds: "The reason given is, that in the latter case, if afterborn children were admitted, *the distribution of the personal estate of the testator [28 would have to be postponed till it could be ascertained how many legacies of the given amount would be payable." So he obviously takes the same view as has been taken by the authorities, namely, that no children born after the testator's death can be admitted unless the total amount of the gift is independent of the number of objects.

So I apply the rule in this case, and hold that no child Mrs. Mutch may have can take under this bequest.

Solicitors: *T. H. Devonshire; Chapple, Welch & Chapple.*

(¹) 2 Cox, 384.

(²) Kay, 643, 644.

(³) Page 73.

[10 Chancery Division, 28.]

M.R., Nov. 18, 1878.

SIMPSON v. DENNY.

[1876 S. 230.]

Partition Acts, 1868 and 1876—Partition Action—Trustees representing Beneficiaries—Rules of Court, 1875, Order xvi, r. 7.

Order xvi, rule 7, of the Rules of Court, 1875, enabling trustees to represent their beneficiaries in an action, applies to an action under the Partition Acts, 1868 and 1876.

[10 Chancery Division, 29.]

M.R., Nov. 23, 1878.

29]

**In re GARDNER'S TRUSTS.*

Practice—Appointment of New Trustees—Vesting Order—Lunatic Trustees out of Jurisdiction—Order in Lunacy as well as in Chancery.

A petition for the appointment of new trustees and for a vesting order, where the existing sole trustee is of unsound mind and out of the jurisdiction, need not be presented in Lunacy as well as in Chancery.

THIS was a petition under the Trustee Acts for the appointment of new trustees of a will, and for a vesting order as to copyholds, the legal estate in which was outstanding in the customary heir of the last surviving trustee.

The heir was of unsound mind and out of the jurisdiction.

Levett, for the petitioner: The question is, whether the vesting order can be made in Chancery alone, under sect. 9 of the Trustee Act, 1850, the trustee being out of the jurisdiction; or whether, inasmuch as he is of unsound mind, the petition should not be intitled and presented, and 30] *the order made, in Lunacy as well as in Chancery: *In re Mason* (').

JESSEL, M.R.: The only point decided *In re Mason* was, that in the case of a lunatic trustee you should intitle your petition in Lunacy as well as in Chancery under the 3d section of the act. The Court of Appeal, however, in directing the petition to be so intitled do not appear to have given any reason for the direction. The 9th section of the act says that when the trustee is out of the jurisdiction the Court of Chancery may make a vesting order; and the 3d section says that when the trustee is a lunatic the Judges in

(') Law Rep. 10 Ch. 273; 12 Eng. R., 725.

Lunacy may make a vesting order. When you read the two sections together they evidently mean this, that when a lunatic trustee is within the jurisdiction the Judges in Lunacy should make the order, but that when he is out of the jurisdiction the Court of Chancery—now the Chancery Division—may alone make the order, just as in the case of any other trustee out of the jurisdiction.

There will, therefore, be the usual vesting order.

Solicitors: *Phillips & Son.*

As to the removal of old and the appointment of new trustees, see 11 Eng. Rep., 646 note; 18 Eng. Rep., 494 note; *Matter of Currie, post*, p. 537.

The executors, etc., of a deceased trustee of personal property succeed to the trusts, and in case an application be made to appoint a new trustee, they are the proper persons to initiate the proceedings. It is not necessary that the creator of the trust should be notified of the application: *DePeyster v. Beekman*, 55 How. Pr., 90, and see note, page 93.

Where a trustee holds the legal title to real estate subject to a trust, it will descend to his heirs subject to the trust: *Russell v. Peyton*, 4 Bradwell, 473.

The original trustees being dead, the court will appoint a new trustee with the powers given by the will, but will not order the trust fund paid over to the beneficiary to end the trust: *Burdick v. Goddard*, 11 R. I., 516.

S. being trustee under a voluntary assignment made by G. & C., died. On a petition in equity, brought by divers creditors of G. & C., for the appointment of a new trustee; held that the death of S. made a vacancy in the office of trustee under Gen. Stat. R. I., cap. 167. Held further, that under the same statute a new trustee could be appointed on petition as well as on bill filed: *Ballou*, petitioner; 11 R. I., 859; *Matter of Foster*, 15 Hun, 387; *Pillsbury v. E. & N.*, etc., 69 Maine, 394.

Where a settlement contained a power to appoint a person or persons to be a new trustee, and the last trustee committed a breach of trust and made away with a portion of the estate, the court after his death appointed two new trustees and vested the estate in

them without reference to such breach of trust: *Matter of Fisher*, 6 Victorian Law Rep. (Eq.), 73.

The defendant corporation mortgaged certain real and personal estate to two trustees, to hold and manage for the protection and security and ultimate payment of those holding their bonds. The deed of trust provided that, in case of death, mental incapacity or resignation of either of said trustees, for the time being, in the trusts therein set forth, all the estate, right, interest, power and control of such trustee shall be divested and cease, and the supreme judicial court of this state shall, upon request in writing of one or more of its bondholders, or of the directors of said corporation, appoint such successor.

One of said trustees having deceased, and a majority in interest of said bondholders having filed a petition for the appointment of one to fill the vacancy; after notice and hearing, such trustee was appointed and accepted the trust, and the court ordered that the surviving trustee, named in the mortgage, execute forthwith all proper conveyances to vest title in such co-trustee: Held that revised statutes, c. 51, § 47, as amended 1876, c. 105, only applies "when no other method of filling vacancies is specifically provided in the appointment, special law or mortgage;" and the appointment, in this case, being made in the mode provided in the deed of trust, is not in violation of that statute, but in accordance with statute of 1876, c. 8, and is properly authorized by law.

Held, that the order requiring the surviving trustee to execute proper conveyances so as to vest title in his co-trustee, being in accordance with the terms of the deed of trust, and with

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the statute of 1878, c. 8, § 2, is good : Pillsbury v. E. & N. A. Railway Co., 69 Maine, 394.

A power in a will to appoint new trustees on the death of the trustees therein named, is not equivalent to a power to appoint new executors, although the same persons are in the will named as trustees and executors : Matter of Campbell, 1 Victorian Law Rep. (Ins. Prob. and Mat.), 82.

Where a trustee makes an illegal investment he is liable for any loss resulting therefrom, although he have resigned and a new trustee been appointed who accepted the illegal security. The old trustee is liable until actual payment of the sum invested to the new trustee : Matter of Foster, 15 Hun, 387.

[10 Chancery Division, 31.]

V.C.M., Nov. 5, 1878.

31]

*NOYES V. CRAWLEY.

[1878 N. 42.]

Demurrer—Statute of Limitations—Partnership Transactions.

In 1858 the plaintiff and defendant entered into partnership transactions which came to a final termination in 1861, when the defendant admitted that £787 was due to the plaintiff, but he never subsequently made any admission of the debt, or promise to pay. The plaintiff brought an action for an account of the partnership dealings :

Held, that the Statute of Limitations could be set up on demurrer; and was a good defence to a claim for partnership accounts.

Miller v. Miller (!) dissented from.

DEMURRER. This action was brought by Thomas H. Noyes, formerly an official in a government office, against the defendant, G. B. Crawley, formerly a solicitor, but since engaged as a contractor of works in various parts of the continent. The claim stated as follows :—

In the year 1858 the defendant persuaded the plaintiff to join him taking a lease of certain mining property in Glamorganshire, for the purpose of working and developing the ironstone and iron ore for their mutual benefit. The lease was executed in August, 1858, and thereby the plaintiff and defendant became entitled to two-thirds of the mining property in question, the other third being in the possession of two persons named Jones and Christian. It was contemplated and agreed, at the time of the lease to the plaintiff and defendant, that a large sum of money should be advanced by the plaintiff for the expenses of carrying on the works, and that money was so advanced to a considerable amount by the plaintiff, and lodged in a bank. The works were carried on by and under the sole direction of the defendant, and with apparent activity, until the month of November, 1860, the plaintiff up to that time having the greatest reliance in his integrity; and the defendant had in

(¹) Law Rep., 8 Eq., 499.

the interval entered into treaty on behalf of the plaintiff and himself for the purchase, or for a lease, of another ironstone mine. In the month of *November, 1860, the defend- [32
ant suddenly abandoned the mining works and left England, deeply involved in liabilities arising from speculations in which he had engaged, and he had ever since, except at occasional intervals (when he had come to England for a few days without the plaintiff's knowledge of his whereabouts), resided on the continent and in America, where he had followed the business of a contractor of works, having ceased to take out his certificate as a solicitor. After the defendant had left England the plaintiff discovered that he had greatly mismanaged the concern, and had left him in ignorance of the position and liabilities of the mine and works; that he had violated his promise as to drawing checks, and had drawn out of the bank the whole of the plaintiff's capital and had appropriated it to his own use, and had not left one shilling to enable the plaintiff to carry on the works or to meet the dead rent of £200 a year payable for the mine, or any other liabilities in respect of the undertaking. The plaintiff, with a view to save the property, was obliged to raise and pay the rent for a considerable time, but being unable to continue to pay the same, the landlord entered into possession and the lease became forfeited; and the defendant, having failed to carry out the arrangement entered into for purchasing the interests of Jones and Christian in the other third part of the mine, left the plaintiff exposed to proceedings at the suit of Jones, who, after the defendant had left the country, sued the plaintiff and obtained judgment against him. The plaintiff never received from the defendant any share whatever of the profits realized by him from the mine during the period of his management, and when applied to on the subject in the year 1861, shortly after he had quitted England, the defendant admitted that he had a balance in hand (amounting on his own showing to £787) which he ought to have paid over to the plaintiff, and stated that he had lent the amount to a third party, by whom he expected to be repaid in the course of a month, when he would hand it over to the plaintiff; but the defendant, notwithstanding the said admission and promise, had never since paid the plaintiff the said balance, or any sum whatsoever on account of the partnership. The plaintiff had repeatedly applied to the defendant to enter into an account and settlement with him in respect of the partnership, but *the defendant had not only refused to render any ac- [33
count whatever, but had absolutely repudiated the plaintiff's

claim in every respect. The plaintiff had sustained considerable loss and injury by reason of the defendant's conduct, and the plaintiff claimed to have an account of all dealings and transactions, including the partnership dealings between the plaintiff and defendant, and to have the partnership wound up, and payment of such sum as should be found due on the account.

The defendant demurred to the plaintiff's claim, alleging that the same was bad in law and in equity, on the ground that such cause or causes of action (if any) as were alleged did not accrue within six years before the commencement of this action, and that the same were barred as well by the Statute of Limitations as also by such lapse of time as disentitled the plaintiff to any equitable relief, and on other grounds sufficient in law and in equity to sustain this demurrer.

Bristowe, Q.C., and *Hadley*, in support of the demurrer: The Statute of Limitations is a bar to the plaintiff's claim in this action; but even if the defence of the statute could not be raised, still the transactions between the plaintiff and defendant terminated so many years ago, that the court will treat the claim as a stale demand. The partnership was finally concluded in 1861, and a sum of money was stated to be due at that time, but there has been no subsequent admission of the debt in writing, or promise to pay, which would take the case out of the operation of the statute.

Bond Coxe, for the plaintiff: This case is concluded by authority both as to the mode of pleading the Statute of Limitations (21 Jac. 1, c. 26), and as to the application of that statute to any action for partnership accounts. Before the Common Law Procedure Act, it was settled at law that the statute should be pleaded by way of defence and not by way of demurrer, as the plaintiff might, in his replication, bring himself within the exceptions of the statute by showing, as an issue of fact, that the defendant had made a part payment, or given an unqualified promise to pay, or an [34] acknowledgment of the debt in *writing, or was absent beyond the seas during the currency of the six years. Since that act, the same rule of pleading has been recognized and enforced by the Court of Queen's Bench in the recent case of *Wakelee v. Davis* (*).

No doubt in the case *Darwins v. Lord Penrhyn* (*), which was affirmed by the Court of Appeal, the Statute of Limitations as to real actions (3 & 4 Will. 4, c. 27) was allowed to

(1) 25 W. R., 60.

(*) 6 Ch. D., 318; 22 Eng. Rep., 845.

be raised by demurrer even *ore tenus* ; but in that case the obvious distinction which exists between personal and real actions was taken. In the former, the remedy only is taken away, while the right remains ; and in the latter both the right and the remedy are gone—the title itself being extinguished at the expiration of twenty years ; and the section of the act limiting actions for rent within six years is only, in effect, a re-enactment of the statute of James as to arrears of rent, or rather, an extension of the subjects enumerated in that statute to arrears of rent, which, when accrued, assume the nature of a personal demand, arising from a covenant in the lease, use and occupation, or other personal liability in the absence of a distress. But even assuming that, in point of pleading, it is competent to plead the bar of the statute by demurrer, instead of by way of plea or defence, it has been held to be inapplicable to an action for partnership accounts, on the ground that such an action is not, in its true construction, a simple action for recovery of a debt—even upon a mercantile account—where the demand is only on one side, as between a trader and his customer in the ordinary course of business ; but it is an action in which there are mutual demands, and in which the plaintiff may not only not recover anything from the defendant, but may, on the result of the accounts, have something to pay to the defendant : *Miller v. Miller* (*). Moreover, in this case the statement of claim, which, for the purposes of the demurrer, stands admitted as to every allegation in it, discloses circumstances which, besides the absence of the defendant beyond the seas, except at intervals secret and unknown to the plaintiff, show such gross abuse of confidence and fraudulent conduct on the part of the defendant, as to make no lapse of time a bar to the action.

**Bristowe*, in reply : The case of *Dawkins v. Lord* [35 *Penrhyn* (*)] is conclusive as to our right to raise the defence of the statute upon demurrer, but the question was settled before that case by Lord Eldon in *Foster v. Hodgson* (*), and by Sir L. Shadwell in *Hoare v. Peck* (*) and in *Prance v. Sympson* (*). As to the statute not running in the case of a partnership, no decision but that of *Miller v. Miller* (*) can be found in favor of such an argument, and great doubt is thrown upon that case by Mr. Justice Lind-

(*) Law Rep., 8 Eq., 499.

(*) 6 Sim., 51.

(*) 6 Ch. D., 318 ; 22 Eng. R., 318.

(*) Kay, 678.

(*) 19 Ves., 180.

(*) Law Rep., 6 Eq., 499.

ley (1); and a similar question was decided the other way in *Knox v. Gye* (2).

MALINS, V.C.: From the allegations in this bill it appears that in the year 1858 the plaintiff and defendant entered into an adventure for the purchase of a mine, which I am bound to treat as a partnership undertaking. Then it appears that difficulties arose between them, and all the dealings and transactions of partnership were discontinued in 1860, and finally came to an end in 1861, after which the landlord entered into possession for non-payment of rent, and the lease was forfeited.

The allegations in the bill, therefore, prove these things: a partnership did exist between the plaintiff and defendant, but terminated in the year 1860. There was an account rendered to the plaintiff in the year 1861, which showed a balance in favor of the plaintiff of £787, and upon the allegations in this bill nothing can be more clear than that the plaintiff in the year 1861 would have been entitled in an action at law, which was the only mode at that time for recovering such sums as this, on an account stated, to recover that £787. Now, the £787 being due in 1861, in order to take the case out of the Statute of Limitations, the plaintiff is bound to allege, and would have been bound to prove at the hearing of the cause, if it had gone to a hearing, either a subsequent promise to pay, and in writing, or part 36] payment, or *something to take it out of the Statute of Limitations. There is no allegation of that.

Consequently, here is a case in which all dealings and transactions between the parties ceased eighteen years ago. An account was stated seventeen years ago, in respect of which there never has been any payment or any subsequent promise to pay. Now, therefore, what can be more clear than that this is a case in which the statute is an absolute bar to the demand?

Then I have had this argument—assuming the Statute of Limitations to be a bar to the demand—it cannot be taken advantage of by demurrer. Now, that the Statute of Limitations can be taken advantage of by demurrer seems to me to be about one of the plainest things that can possibly be. Because a demurrer means simply this: “I admit all you say by your bill or statement of claim, and, admitting all that, you are not entitled to recover. Therefore this defendant says: I admit that I was in partnership with you, I admit that I did render an account which entitled you to

(1) Lindley on Partnership, 4th ed., p. 966,

(2) Law Rep., 5 H. L., 656; 4 Eng. R., 44.

recover £787 in 1861, but, admitting all you say, it appears by your own statement that that promise was made seventeen years ago."

Then comes the statute which says that no action can be brought except within six years after the cause of action accrued. Therefore, on the face of the pleadings, it appears that the plaintiff has no right, and consequently it necessarily follows that that can be taken advantage of by demurrer.

It was settled, long before the case of *Dawkins v. Lord Penrhyn* (*), that the Statute of Limitations can be taken advantage of by demurrer. The decisions of Lord Eldon in the case of *Foster v. Hodgson* (*), and of Sir Lancelot Shadwell in *Hoare v. Peck* (*), are conclusive that even before that case in this court the Statute of Limitations was a good ground of demurrer to a claim when on the face of the bill it appeared that the right accrued more than six years before it was filed.

Then this question came before me in *Dawkins v. Lord Penrhyn*, where first of all there was a fatal bar according to my judgment, which was affirmed by the Court of Appeal, because the plaintiff claimed under an entail which had been barred. But then came *the point that, [37 even supposing the estate tail was not barred, the right had accrued to the late Colonel Dawkins, the father of the present colonel, twenty-five years before the action was brought. Therefore, to my mind, it was perfectly clear that the lapse of twenty-five years was a bar to the right, because the statute says that no entry shall be made, which also means that no action shall be brought—no action of ejectment in this court or any other, except within twenty years after the right accrued. There the right had accrued twenty-five years before. Then the only point was, could the statute be taken advantage of by way of demurrer, because in that case they demurred? The new rules say you must state one cause of demurrer, but, having stated one cause of demurrer, you may avail yourself of any other ground of defence by way of demurrer; and therefore, as the Statute of Limitations was not mentioned in the demurrer, I had there to consider the question whether it could be taken advantage of as another ground of demurrer, it not having been put forward as the ground, or one of the grounds in the demurrer itself. I decided that it could be, and that decision was affirmed by the Court of Appeal. It is therefore perfectly settled in this court that you can take advantage

(*) 6 Ch. D., 318; 22 Eng. R., 845.

(*) 19 Ves., 180.

(*) 6 Sim., 61.

of the Statute of Limitations by way of defence, by demurrer.

Now, what is there alleged against this? There are only two cases cited; one is the case of *Miller v. Miller* (¹), decided by Vice-Chancellor Stuart, which Mr. Bond Coxe cited as a general authority, that, between persons who have been partners, where there has once been a partnership, and the executor of one partner brings a bill for an account against the other after any lapse of time whatever, the statute cannot be taken advantage of. I cannot think that Sir John Stuart, with his great learning and experience, could ever have intended to decide in such a manner. On the contrary, I believe the decision must have proceeded on the ground that in that case the parties had executed a deed by which all the partnership property was assigned on trust to pay the creditors, and afterwards to divide what remained between them. There, a trust being created, nothing short of twenty years could be a bar to that trust. I think it must have proceeded on that ground, not on the general 38] principle that as between partners, *no lapse of time will be a bar to an action. If Sir J. Stuart did decide that, I can only say I entirely dissent from the decision, as every other case has dissented from it, and it is certainly overruled by the decision of the House of Lords in *Knox v. Gye* (²), which decided the broad point that where a bill for an account is filed by the executors of a deceased partner against the surviving partner, after the lapse of more than six years, although the business, which in that case was the business of a theatre, was carried on by the surviving partner during the six years, the Statute of Limitations is a final bar to such a claim; and that is greatly to the benefit of society, because it is of the utmost importance that time should put an end to all disputes.

With regard to the observation in the short report of the decision of the Court of Queen's Bench in *Wakelee v. Davis* (³), their attention does not seem to have been called to the authorities in this court that have existed since 1776, namely, the decision of Lord Eldon, which I have referred to, and that of Sir Lancelot Shadwell. But the Lord Chief Justice says, "The cause of action remains, although the remedy may be suspended." I do not agree with that. The cause of action does not remain, because the statute says that no action shall be brought, and if there is no action, why does it remain in one case more than another? No

(¹) Law Rep., 6 Eq., 499.

(²) Law Rep., 5 H. L., 656.

(³) 25 W. R., 60.

entry is to be made in one case and no action in the other. The thing is gone, there is no remedy whatever. Then his Lordship says "the defendant must plead the statute." That observation can have no force here, because he does not plead. It is not necessary to plead, because there is an authority settled now, that where you are entitled to take advantage of the statute you may do it by demurrer instead of by plea. Therefore that observation does not apply, and I am bound to say that the case of *Wakelee v. Davis* is an authority which I cannot understand after the decision of the Court of Appeal, which is so utterly inconsistent with it, and which is a subsequent decision. I think *Wakelee v. Davis* must be considered to be overruled by that authority.

Therefore, on every principle, as well as authority, I am bound to come to the conclusion, which I do with the most entire satisfaction, that the Statute of Limitations is a bar to such a claim as *this; and that no party can maintain an action against a person who has been in partnership with him after the lapse of six years from the determination of the partnership, unless there has been something in the interval to bind the parties. I entirely agree with the law as laid down by Mr. Justice Lindley, in the passage to which Mr. Bristowe has referred me. Mr. Justice Lindley says ('): "So long, indeed, as a partnership is subsisting, and each partner is exercising his rights and enjoying his own property, the statute has, it is conceived, no application at all; but as soon as a partnership is dissolved" (which it was here in 1860), "or there is any exclusion of one partner by the others, the case is very different, and the statute begins to run." He then says: "This has been decided by the House of Lords in *Knox v. Gye* ("), in which a surviving partner relied on the statute as a defence to a suit for an account instituted by the executor of a deceased partner. The deceased partner had died more than six years before the filing of the bill, and the right of his executor had never been recognized. The surviving partner, however, had continued the partnership business and had got in outstanding assets within six years. The Vice-Chancellor Wood held that the statute was not a bar to the suit; but the decision was reversed by Lord Chelmsford on appeal, and the House of Lords affirmed Lord Chelmsford's decision." And I am very glad they did, for I think it is very greatly to the interest of society that the Statute of

(') 4th ed., p. 966.

(") Law Rep., 5 H. L., 656; 4 Eng. R., 44.

Limitations should be applied to every case where it can with fairness be applied.

Then, with regard to the case of *Miller v. Miller* (¹), Mr. Justice Lindley says this: "*Miller v. Miller* is hardly consistent with this, unless on the ground that there was no dissolution." Here I have a case in which, beyond all question, on the allegations in the bill, there was a dissolution, or a termination, which is the same thing. The parties had dealings and transactions, but when the landlord put an end to the lease in 1860 all operations ceased.

The demurrer, therefore, must be allowed in the usual way, with costs, which will give the defendant the whole costs of the action.

40] **Bond Coxe* asked for leave to amend, and observed that his Lordship had not referred to what might be called the abuse of confidence and the allegations of fraud.

MALINS, V.C.: I shall certainly not give leave to amend. As to the allegations of abuse of confidence and fraud, I do not consider there is any fraud. The circumstances all resolve themselves into partnership dealings and transactions. Abuse of confidence is so frequent in partnership matters, that it would indeed be lamentable if the court allowed such an exception as that an action might be brought after six years where there was a breach of confidence.

Solicitor for plaintiff: *C. A. Emmett.*

Solicitors for defendant: *Randall & Angier.*

(¹) Law Rep., 8 Eq., 499.

In New York the defence of the statute of limitations can only be interposed by answer, and cannot be raised by demurrer: Code Civil Procedure, § 413; *Sands v. St. John*, 86 Barb., 628, 23 How., 140, affirmed by Court Appeals, June, 1865, 29 How., 574; *Voorhies v. Voorhies*, 24 Barb., 150; *Colton v. Maurer*, 8 Hun, 552; *Leferts v. Hollister*, 10 How. Pr., 333; *Humphrey v. Persons*, 23 Barb., 314;

Fogal v. Pino, 17 Abb., 114; *Wagoner v. Jermain*, 3 Denio, 306; *Bihin v. Bihin*, 17 Abb., 19; *Keyser v. Keyser*, 16 Hun, 602; *Williams v. Willis*, 15 Abb. (N.S.), 11; *Clinton v. Eddy*, 1 Lansing, 61; *Chappell v. Durston*, 1 Crompt. & Jerv., 1.

See Bliss's Code Pleading, § 355; *Selover v. Coe*, 63 N. Y., 438; *Baldwin v. Martin*, 14 Abb. (N.S.), 9; *Riley v. Corwin*, 17 Hun, 597.

[10 Chancery Division, 40.]

V.C.M., Nov. 9, 1878.

In re JONES.

JONES V. CALESS.

/ [1877 J. 52.]

Administration Action—Costs—Lapsed Share.

The cases in which a lapsed share of real or personal estate will be the primary fund for payment of costs of administration, discussed.

Scott v. Cumberland (1) and *Gowan v. Broughton* (2) explained.

WILLIAM JONES, of Ratley, farmer, by his will, dated in 1871, gave all his estate in lands at Ratley to the use of his brother Thomas Jones, subject to all mortgages charged thereon, and also charged with a sum of £4,000; and he bequeathed to trustees all his personal estate and effects upon trust, after payment of his debts, funeral and testamentary expenses, for persons therein named.

The gift of the lands at Ratley lapsed by the death of the devisee in the lifetime of the testator, and the question arose how the costs of the suit were to be paid, whether they ought to come out of the lapsed share or out of the residuary personal estate.

**Twoedy*, for the plaintiff.

[41]

Henderson, for the heir-at-law: In *Scott v. Cumberland* (1) a lapsed share of real estate was made to bear the costs in priority to personal estate effectually disposed of, but in this case the testator has directed that the personal estate shall bear his testamentary expenses, which include these costs: *Eyre v. Marsden* (3).

Bardswell, for the next of kin: *Scott v. Cumberland* lays down a rule of law which applies to this case, and the lapsed realty ought to bear the costs.

In *Gowan v. Broughton* (2) your Lordship applied the rule laid down in *Scott v. Cumberland* to a lapsed share of residuary estate, and held that such lapsed share was the primary fund for payment of costs.

The Master of the Rolls in *Trethewen v. Helyar* (4), and Vice-Chancellor Bacon in *Fenton v. Wills* (5), dissented from your Lordship's opinion in *Gowan v. Broughton*, but *Scott v. Cumberland* has never been dissented from.

(1) Law Rep., 18 Eq., 578; 11 Eng. R., 546. (2) 4 My. & Cr., 281.

(3) 4 Ch. D., 53; 19 Eng. R., 662.

(4) Law Rep., 19 Eq., 77; 11 Eng. R., 687. (5) 7 Ch. D., 33; 23 Eng. R., 884.

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Cozens-Hardy, for parties in the same interest.

MALINS, V.C.: No one can doubt that the residuary personal estate is primarily the fund for payment of the costs of administration, and all that I intended to decide in *Gowan v. Broughton* was, that where the residuary personality is given to a person who dies in the life of the testator, such personality is no less the primary fund for payment of the costs than it would have been if the legatee had survived. [His Lordship then referred to the cases of *Trethewen v. Helyar* and *Fenton v. Wills*, and pointed out that the decision in those cases was in accordance with his decisions in the cases before him.]

But in this case the testator has directed that the personality *shall remain the primary fund for payment of testamentary expenses, which includes general costs of suit, and they must therefore be paid out of the residuary personality in priority to the lapsed devise of real estate.

Solicitors: *Glynnes, Son & Church; Burton, Yeates & Hart; Sharpe, Parkers & Co.*

[10 Chancery Division, 42.]

V.C.M., Nov. 4, 1878.

In re HERNE BAY WATERWORKS COMPANY.

Petition to wind up by Debenture Holders—Powers under the Act.

An unregistered company, incorporated by act of Parliament, borrowed money under the powers of their act upon debentures, and the debenture holders, not being able to get payment of their principal or interest, obtained the appointment of a receiver, but the profits of the concern not being sufficient to keep down the interest upon the debentures, the debenture holders presented a petition for winding up the company, and for sale of the concern:

Held, that the only rights the debenture holders had under the act of Parliament were the appointment of a receiver and priority over other debtors; and not being in the position of ordinary mortgagees, they could have no winding up or sale of the undertaking.

Petition dismissed.

THIS was a petition to wind up the Herne Bay Waterworks Company, which was an unregistered company incorporated by act of Parliament in 1867. By this act, with which the Companies Clauses Consolidation Act, 1845, was incorporated, it was provided by the 11th section that the company should be at liberty to borrow on mortgage any sum not exceeding £1,200. By the 12th section it was enacted that the mortgagees of the said company might enforce payment of the arrears of interest or principal, or interest due on their mortgages by the appointment of a

receiver; and by the 13th section it was enacted that all moneys to be borrowed on mortgage under the act from the time when the said moneys should be advanced, and the interest for the time being due thereon, should have priority against the company, and all the property from time to time of the company, over all other claims on account of *any debts to be incurred or engagements to be entered into by them. The whole of the capital was raised, and in September, 1869, the company borrowed from the petitioners the sum of £1,200 at 6 per cent. per annum, on mortgage of their undertaking. The mortgages were in the form prescribed by the Companies Clauses Consolidation Act, 1845. The company failed to pay the interest due in respect of the mortgage, and on the 7th of May, 1872, a bill was filed by the petitioners against the company for an account of what was due on their mortgage, and for a decree for payment of the amount, and the appointment of a receiver. On the 20th of July, 1872, the case came on before the Master of the Rolls, who appointed J. B. Turner the receiver, and on the 27th of July, 1872, an account was ordered to be taken and inquiries made in respect of charges and priorities on the undertaking. On the 16th of June, 1875, the receiver passed his account, when it appeared there were no funds in hand out of which the principal and interest due to the petitioners could be paid, but there was a debt due to the receiver for moneys paid by him in respect of the works. On the 18th of March, 1878, there was due to the petitioners for principal and interest £1,745, without including a considerable sum for costs, and this sum was still due and owing to the petitioners.

On the 7th of November, 1877, the petitioners entered into an agreement to sell their interest in the undertaking to Robert Sankey and Frederick Flint for the sum of £1,900, and to obtain the sanction of the court to a foreclosure order, but the petitioners were advised that no decree or order for foreclosure could be obtained, and that in order to realize their security by sale of the undertaking it was necessary to wind up the company. To carry out this arrangement the present petition was presented for an order to wind up the company, for the appointment of a liquidator, and for sale and transfer of the undertaking. It was in evidence that the company were at present unable to provide a proper and sufficient supply of water to the district of Herne Bay, but that the works might be improved and made capable of effecting all that was requisite by the outlay of £1,000, and that the intended purchasers would

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be willing to restore the works, and to place the undertaking on a proper footing.

44] **Glasse*, Q.C., and *B. Druce*, in support of the petition:

This company is now in so hopeless a state that it is impossible for them to carry on the undertaking, or to supply the district of Herne Bay with the requisite quantity of water. The petitioners are unable to obtain repayment of their money, and the receiver is obliged to apply all the tolls and profits in keeping up the works, consequently there is nothing left for the petitioners. The only prospect, therefore, for the benefit of all parties is that the undertaking should be wound up, and the petitioners would then be able to effect a sale of the property to persons who are now willing to give £1,900, and to carry on the works so that they may become profitable. The law is laid down by the case of *In re Exmouth Docks Company* (1), that where it is shown that there is no other process by which the difficulties of a company can be overcome, then there must be a winding up of the concern. In that case a receiver had not been appointed, and the court declined to wind up the company until a receiver had been appointed and it had been found that he had failed to obtain payment. Here a receiver has been appointed, and he has failed to obtain funds for paying off the mortgage. In the case of *In re Bradford Navigation Company* (2), the court ordered a canal company to be wound up where it was found that the company could not be successfully carried on; and a similar order was made in *In re Wey and Arun Junction Canal Company* (3), where the canal was being worked at a loss, and in *In re Basingstoke Canal Company* (4). It may be that it will be necessary to obtain an act of Parliament for the purpose of selling the undertaking, but without the sanction of the court the company have no power to spend money in applying for an act.

Higgins, Q.C., and *Millar*, for the company, opposed the petition: The first question is a mere matter of law, and we contend that the court cannot make an order to wind up a company upon a petition by debenture holders, who are not the persons to present such a petition within the meaning of the winding-up acts. *Secondly, we contend that, even if the court has jurisdiction to make the order, the particular circumstances of this case are such that no order to wind up ought to be made. This is a petition by

(1) Law Rep., 17 Eq., 181.

(2) Law Rep., 10 Eq., 331.

(3) Law Rep., 4 Eq., 197.

(4) 14 W. R., 956.

statutory debenture holders who have taken their security under the act of Parliament, which says that they are entitled to recover their principal and interest by the appointment of a receiver to take possession of the tolls and profits of the company for keeping down the mortgage. Debenture holders have no security beyond this, and they are not entitled to the right of sale and foreclosure like ordinary mortgagees. The case of *In re Exmouth Docks Company* is distinctly an authority in our favor, for in that case⁽¹⁾ your Lordship observed that the only remedy the lender of money under the act has is the appointment of a receiver, and he is entitled to no other remedy. That case was decided upon the authority of *Gardner v. London, Chatham and Dover Railway Company*⁽²⁾.

If a winding-up order is made upon this petition the effect will be to oust the general creditors of the company, who stand behind the debenture holders, while if the company is carried on we have evidence to show that by an outlay of not more than £1,000 the works may be so improved as to supply the whole district with water, and the undertaking may then be carried on at a profit. The company have the expectation of being able to raise this money, and they object to having the concern broken up and destroyed and all their interests thrown away.

MALINS, V.C.: As there appears to be no prospect of an amicable arrangement being made between the parties in this case, I must decide the not unimportant question raised by the petition, whether a company of this kind established by act of Parliament to supply a town with water, which has also power given by their act of borrowing money in furtherance of those objects, can be wound up if there is default in payment of principal and interest secured by debentures. This act of Parliament was passed in July, 1867. It authorized the company to raise £1,200 by debentures, and the debenture holders were to have the [46 security of all the property of the company, the general creditors standing behind them. The debenture holders are, therefore, the first creditors, and have all the remedies which mortgagees under the act of Parliament can have against the property of the mortgagors. It appears that the petitioners advanced to the company in 1869 the whole amount they were authorized to raise by debentures, namely, £1,200. They took security in the usual form for repayment of the principal and interest at 6 per cent. per annum. It is admitted that not one single penny has been paid in

(1) Law Rep., 17 Eq., 189.

(2) Law Rep., 2 Ch., 201.

respect of principal or interest from that day to this. The position of the petitioners, therefore, is certainly a hard one, having for nine years been kept out of their principal and interest, and now they find that unless something is done there is no hope of anything more in the future than in the past.

What, then, are they entitled to? There are certain creditors who have no right to call on their debtor to pay the principal, as, for instance, a man who lends money to the government, has no right to call upon the government to repay him. The owner of £100 consols has a right to three pounds per annum for ever, but he cannot call on the government to repay the principal. The only mode by which he can obtain his principal is by selling his stock. The question is, whether these mortgagees are entitled to say, We lent the money in the ordinary way of mortgagor and mortgagee, and we are entitled to all the remedies of mortgagees; and if you do not pay, we will sell or foreclose. But they cannot sell or foreclose. Why, then, are they deprived of these remedies? It must be because they do not stand in the position of ordinary mortgagees. They have advanced their money under the act of Parliament, which gives them only one remedy, which is the appointment of a receiver, and with that remedy they must be content. The argument on the other side is, that if the ordinary remedy is not open to them they must break up the concern. In the case of *In re Exmouth Docks Company* (*) I said that the principle acted upon in *Gardner v. London, Chatham and Dover Railway Company* (†) was applicable to that case; and the act of Parliament having given the remedy by the 47] appointment of a receiver *only, the lender of money must be taken to have acted with the knowledge of that fact, and in reliance on that remedy which the act of Parliament has given him. Then I referred to the reasons given by Lord Cairns, which were these, "Whatever may be the liability to which any of the property or effects connected with it may be subjected through the legal operation and consequences of a judgment recovered against it, the undertaking, so far as these contracts of mortgage are concerned, is, in my opinion, made over as a thing complete, or to be completed; as a going concern, with internal and Parliamentary powers of management not to be interfered with: as a fruit-bearing tree, the produce of which is the fund dedicated by the contract to secure and to pay the debt. The living and going concern thus created by the Legislature

(†) Law Rep., 17 Eq., 181.

(*) Law Rep., 2 Ch., 201.

must not, under a contract pledging it as security, be destroyed, broken up, or annihilated." In that case no question of winding-up could arise, but what the creditors wanted was to sell the surplus lands, and the decision was, that the creditors were not in the position of mortgagees entitled to have the lands sold, but they were entitled only to the tolls or fruits of the undertaking.

Bearing in mind the nature of these securities, what are the powers given to the holders thereof under the act of Parliament? First, then, by the 11th section the company have power to borrow on mortgage £1,200. By the 12th section the mortgagees have power to enforce payment of the arrears of interest or principal, or principal and interest due to them, by the appointment of a receiver; and by the 13th section all moneys to be borrowed on mortgage, and the interest for the time being due thereon, are to have priority against the company, and all the property of the company, over all other claims on account of any debts to be incurred or engagements to be entered into by them.

Now, when the money was advanced what had the proposed lenders to look to? In my opinion they were bound to look to the fact that they were lending money to establish a public object sanctioned by act of Parliament, and were, therefore, only entitled to that remedy which the act gives, and that is, the appointment of a receiver, whose duty is to receive all the tolls of the company until the whole principal and interest secured by the mortgage is paid. Beyond that the lenders have no security whatever. In *In re Exmouth Docks Company* (1) it was said the only [48 result of obtaining a receiver would be that it would be found there was nothing to receive; and the same observation might be made here; but I cannot help thinking that if these gentlemen who have lost their money would endeavor to assist in improving the works the concern might still be made to yield a profit.

Upon the whole, I think the case comes within the principle of *In re Exmouth Docks Company*, in which I was guided to a great extent by the rules laid down by Lord Cairns in *Gardner v. London, Chatham and Dover Railway Company* (2); and that these petitioners have lent their money on the security which the act of Parliament gives them, namely, the appointment of a receiver, and with that security they must be content. Consequently this petition to wind up the company cannot be sustained, and must be dismissed with costs. But as I think the petition was demur-

(1) Law Rep., 17 Eq., 181.

(2) Law Rep., 2 Ch., 201.

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rable, on that ground I shall direct that the petitioners are not to pay the costs of the affidavits which have been filed.

Solicitors for petitioners: *Marriott & Jordan.*

Solicitor for company: *J. B. Batten.*

[10 Chancery Division, 49.]

V.C.M., Aug. 5: C.A., Nov. 11, 12, 15, 23, 1878.

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**In re AGAR-ELLIS.*

AGAR-ELLIS V. LASCELLES.

[1878 A. 95.]

Infants—Religious Education—Rights of Father—Examination of Infants by the Court.

A Protestant on his marriage with a Roman Catholic lady promised that the children of the marriage should all be brought up as Roman Catholics. Soon after the birth of the first child he determined that they should be brought up as Protestants, to which determination he adhered. At the time of the proceedings there were three children, girls, aged respectively nine, eleven, and twelve. The mother, unknown to the father, and in spite of his express directions, had so indoctrinated them with Roman Catholic views that ultimately they refused to go with their father to a Protestant place of worship. The father thereupon commenced an action in their names by himself as next friend, he being a co-plaintiff, to have them made wards of court, and took out a summons in the action for directions as to their education. The wife then presented a petition in the matter of the infants, and of the act 36 & 37 Vict. c. 12, with a view to their being brought up as Roman Catholics. Vice-Chancellor Malins dismissed the petition, and made an order on the summons declaring that the children ought to be brought up as members of the Church of England, and ought not to be taken to Roman Catholic places of worship, and restraining the mother from taking them to confession or to Roman Catholic places of worship without the consent of the father:

Held, on appeal, that the father had not forfeited his right to have the children brought up according to his own religious views, and that the court would aid him in enforcing that right, and that the injunction had been rightly granted:

But *held*, that the declaration ought to be omitted, leaving it to the father to do what he considered to be best for the temporal and spiritual welfare of the children.

The court refused to examine the children, considering that a stronger case was required to induce the court to interfere with a father than with a testamentary guardian.

Stourton v Stourton (1) considered.

On the 8th of February, 1864, the Hon. Leopold Agar-Ellis, a Protestant, married the Hon. Harriet Stonor, a daughter of Lord Camoys, who was a Roman Catholic. There were four children of the marriage, the eldest of whom, a boy, was born in November, 1864, and died in 50] 1872. The other three, Caroline, Harriet, *and Evelyn Mary, were born respectively on the 8th of January, 1866, the 21st of January, 1867, and the 11th of January, 1869.

Previously to the marriage a discussion took place as to the religious education of the children if there should be any.

(1) 8 D. M. & G., 760.

There was some conflict of evidence as to what passed on the subject, the case made by the wife being that previous to the marriage Mr. Agar-Ellis gave in the presence of witnesses an express unconditional promise that all the children should be brought up as Roman Catholics, and that the marriage had been agreed to on the faith of this promise. The case was dealt with on the supposition that this was the real state of facts.

The eldest child was baptized as a Roman Catholic, but, as Mr. Agar-Ellis stated, much against his wish. The eldest of the daughters was baptized as a Roman Catholic without the father's knowledge, and in disobedience to his express directions. The second daughter was baptized as a Protestant. The third, without the father's knowledge and against his orders, was baptized as a Roman Catholic.

On the 3d of April, 1869, Mr. Agar-Ellis took the boy and the two girls who had been baptized as Roman Catholics to St. Saviour's Church, Pimlico, and had them formally received into the Church of England, and their names entered in the register of baptisms.

From the time that the children were old enough to go to church, the father, as he deposed, took them, or had them taken, to a place of worship of the Church of England. After church on Sundays he used to teach them the catechism of the Church of England, and he insisted that the nurse and governess who had the charge of the children should be Protestants, and should educate the children as Protestants, and he only allowed them to visit at the house of the wife's father on her promise that they should not go into the chapel at the house.

Mrs. Agar Ellis, by an affidavit made on the 24th of July, 1878, in support of her petition, which will be mentioned hereafter, deposed as follows:—

“My children have always remained under my maternal care, and I have devoted much time and personal attention to their education, and, relying on and feeling justified by the promise *given by my husband as aforesaid, I have [51] omitted no opportunity of imbuing them with the principles of the Roman Catholic religion. I have regularly and systematically taught them the Catholic catechism and Catholic prayers, and have very frequently taken them to Catholic churches; and I have also, though without telling, and so far as I am aware, without the knowledge of their father, caused them to receive such sacraments of the Roman Catholic Church as it is usual for children of their age to receive. The said Caroline Agar-Ellis has been to confession about

once a month for the last three years. The said Harriet Agar-Ellis has been to confession at similar intervals for the last two years, and the said Evelyn Mary Agar-Ellis has been to confession at similar intervals during the last twelve months. All my said three children have been confirmed as members of the Roman Catholic Church by a Roman Catholic bishop.

"The said Caroline Agar-Ellis, and Evelyn Mary Agar-Ellis, my second and fourth children, were baptized as Roman Catholics. Relying on the promise aforesaid, I caused them to be so baptized without the knowledge or permission of my husband.

"Under the circumstances aforesaid, and as the result of my systematic and sustained teaching, the said three above-named infants are as well instructed in all the distinctive doctrines of the Roman Church, and are as fully impressed with the truth of those doctrines, and as fully conversant with and habituated to the practices and devotional usages of the Roman Catholic Church, as it is possible for intelligent and thoughtful children of their ages to be; and although they have as aforesaid attended Protestant churches and learnt some portions of the Protestant catechism, such attendance and learning have been very reluctant, and submitted to only in unwilling obedience to the positive commands of their father, and after much expostulation with him.

"Early in the present year the said three children refused to go any more to the Protestant church, and they have never done so since. When they first refused such attendance they were punished by their father for such refusal."

Mr. Agar-Ellis deposed that the punishment above alluded to consisted only in his refusing them leave to spend the 52] afternoon of *that day at their cousins', and that he had not been aware till the spring of the present year that the children went habitually to Roman Catholic churches, and that he never knew of their having been confirmed as Roman Catholics, or of their attending confession till he learnt it from Mrs. Agar-Ellis's affidavit.

On the 28th of June, 1878, Mr. Agar-Ellis settled a sum of £100 consols upon trust for the three children, and on the 1st of July an action attached to the court of Vice-Chancellor Malins was commenced by Mr. Agar-Ellis, and the children by him as their next friend, against the trustee to have the trusts of the settlement carried into execution, and on the 5th of July the usual judgment for that purpose was given.

On the 20th of July Mr. Agar-Ellis took out a summons in this action for directions as to the place where, and the persons by whom, the infant plaintiffs ought to be educated, and, by an exhibit to an affidavit, stated that he proposed on the 3d of August to send the children to the house of a beneficed clergyman, whom he named, to be educated and boarded.

On the 23d of July Mrs. Agar-Ellis presented a petition at the Rolls in the matter of the infants and of the act 36 & 37 Vict. c. 12, stating the ages of the children, the promise of the father before the marriage, and the facts contained in the paragraphs of her affidavit which are set out above. The petition further stated that the father had recently threatened that he would on the 3d of August remove Harriet and Evelyn to some Protestant parsonage, and would also remove Caroline from the care of her mother and cause her to be brought up as a Protestant; and, in the first instance, threatened that he would prevent the mother holding any intercourse with any of her children, but afterwards said she might sometimes see or write to them on condition that she should never speak or write on the subject of religion. That, under the circumstances, any attempt to bring up the three children as Protestants would have the effect of violating their consciences, and thus of materially injuring their moral sense; and further, that the children, and particularly the eldest, were at an age when their mental and physical well-being required maternal watching and care, and therefore that any separation between them and the mother, or any check *upon the natural confidence [53 existing between them and their mother, would be attended with most injurious results. The petition prayed that such proper directions might be given for the custody and education of the infants as should prevent their being deprived of the society and maternal care of, and free intercourse with, the petitioner, and should admit of their being brought up as Roman Catholics; and that the petitioner might not be debarred from seeing or writing to them, except on the terms of her not speaking or writing to them on the subject of religion; or, at all events, that such directions might be given for their education as should most conduce to their moral welfare, having regard to their previous education and present state of mind and circumstances.

The petition was transferred to the court of Vice-Chancellor Malins, and came on to be heard along with the summons.

Mrs. Agar-Ellis, by a further affidavit, stated as follows:

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"My efforts to bring up the children Roman Catholics were never relaxed. I always enjoined them most strictly to answer their father truthfully whatever questions he might put to them in that regard. There were scenes on every occasion of their being forced by their father to go to the Protestant church. During the last two years they constantly insisted that they were Catholics, and ought not to be so compelled My husband never asked me to promise, and I never did promise, not to take our children to the Roman Catholic church, except as to their not attending service in the chapel at Stonor, and then only because I knew that their stay there would be short, and that they required change of air, which we had not the means to provide for them. My husband never heard our children their morning or night prayers, nor required the nurse or governess to do so. All he did require was that they should be taken to the Protestant church on Sunday, and that a chapter from a child's bible should occasionally be read to them. Of this latter I did not disapprove. . . . Our children are highly educated. They speak French and German, and the two elder ones play classical music, which I have taught them. These advantages are entirely owing to my own continued hard work and self-denial during the last fourteen years."

56] **Bagshawe*, Q.C., and *F. G. Bagshawe*, for Mrs. Agar-Ellis.

Glasse, Q.C., and *G. C. Price*, contra.

The case was to a great extent heard in private, and only the close of the argument, on the 5th of August, 1878, took place in open court.

MALINS, V.C.: This is perhaps the strongest case that has ever occurred showing the misery that ensues from mixed marriages. In the year 1863 a Mr. Agar-Ellis was paying his addresses to Miss Stonor, a daughter of Lord Camoys. It appears from the evidence that there were two obstacles to this marriage, which existed for some time. One was pecuniary, but that on both sides was stated to have been removed. The other was religion, and the difficulty was that Mr. Agar-Ellis was a Protestant and a member of a Protestant family, while Miss Stonor was a Roman Catholic and a member of an old Roman Catholic family. After considerable difficulties, it is stated that at a visit which was paid by Lord and Lady Camoys and their two daughters to the Duke of Sutherland, Mr. Agar-Ellis, being a visitor in the house, in the latter part of the year 1863, agreed to give way on the subject of religion, and entered

into an engagement that all the children he might have by the marriage should be brought up in the Roman Catholic religion. That was positively sworn to by Mrs. Agar-Ellis herself, and it is distinctly confirmed by Lord Camoys in his affidavit. The parties were thereupon married on the 8th of September, 1864, and the ceremony was performed according to the rites of both the Roman Catholic church and the Church of England. The Duke of Sutherland also makes an affidavit, in which he confirms in every respect the statement made by Lord Camoys. Mr. Agar-Ellis himself, by his affidavit, admits there was that engagement, but he says that there was afterwards an arrangement, in the shape of a conversation which took place between himself and Miss Stonor, the effect of which was to alter or control that promise. On the other hand, Mrs. Agar-Ellis says that she believed, and acted on the belief, that, as he had promised his *children should be brought up as Ro- [55 man Catholics, he would embrace her religion, and that she would not be called on to embrace or allow the children to embrace his religion.

The first child of the marriage was born on the 8th of November, 1864. He was a boy, and lived till 1872, that is, until he was nearly eight years of age. That child, it is admitted, was baptized as a Roman Catholic. Mr. Agar-Ellis, by his affidavit, says it was done very much against his wishes. But Mrs. Agar-Ellis says he distinctly agreed to it, and she says that her husband left it to her mother to make the arrangements, and that with his fullest approbation the elder child was baptized according to the Roman Catholic church. It is, however, in my opinion, clear from the evidence on both sides that this baptism took place very much against his wishes, and that from that time, 1864, or certainly as early as 1865, constant differences took place between the husband and wife on this subject. Mrs. Agar-Ellis is a lady of education; she says she has educated her daughters with the greatest care, and I am satisfied she has done so, and Mr. Agar-Ellis, I am sure, entirely acquiesces in that view of the case. But it is evident that from the year 1865 down to the presentation of this petition this struggle has been going on, the father desiring the children to be brought up as Protestants, and the mother determined that they should be brought up as Roman Catholics, and taking advantage of every opportunity she had to instruct them in doctrines of the Roman Catholic church, and to bring them up in every way she could as Roman Catholics; and I am very sorry to find that she has thought herself

justified in going to such an extent as this, that she has set at defiance the authority of the father over the children, and has so far instilled these principles into the children; and I cannot but express my regret that she has done so, seeming to have entirely forgotten that by the laws of England, by the laws of Christianity, and by the constitution of society, when there is a difference of opinion between husband and wife, it is the duty of the wife to submit to the husband. I am also sorry to find she states in the petition that, unknown to her husband, she has had two of the children baptized contrary to his wish and knowledge in the Roman Catholic faith, and that she has taken them to confession at this early age, which is a thing well known to be most objectionable *to Protestants. The eldest child is now twelve and a half, the second eleven and a half, and the third nine and a half years of age, and she says that the eldest child, "the said Caroline Agar-Ellis, has been to confession about once a month for the last three years, the said Harriet Agar-Ellis at similar intervals for the last two, and the said Evelyn Agar-Ellis at similar intervals during the last twelve months. All the said three infants have been confirmed as members of the Roman Catholic church by a Roman Catholic bishop. The said Caroline Agar-Ellis and Evelyn Mary Agar-Ellis, your petitioner's second and fourth children, were baptized as Roman Catholics. Your petitioner, relying on the promise as aforesaid, caused them to be so baptized without the knowledge or permission of her husband." I mention this to show the lamentable extent to which these differences have led, and I think the worst of all is the 13th paragraph of the petition, in which she says, "Early in the course of this year"—which I take to be January, when the eldest daughter was twelve, the second eleven, and the youngest nine—"the three children refused to go any more to the Protestant church, and they have never done so since—when they first refused such attendance they were punished by their father for such refusal"—so that it has come to this, that because the father desires to take his children to the Protestant church the children are instructed by their mother to refuse, and they do refuse absolutely, to go to church with their own father, and he has punished them accordingly—that is, he refused to allow them to pay a visit, or something of that kind. I do not wonder that he marked his sense of displeasure, for I cannot imagine a more lamentable state of things. Under these circumstances, I have the painful duty to decide what ought to be done. The principles of this court are the prin-

ciples of common sense and the principles of propriety, that the children must be brought up in the religion of the father. The father is the head of his house, he must have the control of his family, he must say how and by whom they are to be educated, and where they are to be educated, and this court never does interfere between a father and his children unless there be an abandonment of the parental duty, and that may be considered to take place when the father brings them up irreligiously, as in the celebrated case of *Shelley v. * Westbrooke* ⁽¹⁾, where Mr. Shelley pro- [57 posed to bring his children up as infidels or atheists; where there is immoral conduct, as in another celebrated case of *Wellesley v. Wellesley* ⁽²⁾; or where the court is of opinion that the father has been guilty of abandonment of the parental duty. Then and then only will the court interfere. That the children must be brought up in the religion of the father is decided by every case in this court, and as instances I may notice *Davis v. Davis* ⁽³⁾ and *Hill v. Hill* ⁽⁴⁾. *Davis v. Davis* is a remarkably strong case, because the question there arose after the death of the father, who was a Roman Catholic, and the son had shown the strongest reluctance to be brought up as a Roman Catholic from seven years of age downwards, and he was then twelve, and had not only said so but written it, yet the father being dead, and having given directions how this child should be brought up, the direction of the court by Lord Hatherley, then Vice-Chancellor Wood, was, that the child should be brought up in the religion of his father. *Hill v. Hill*, a decision by the same judge, is to the same effect; but perhaps this doctrine has never been more distinctly or better expressed than it is by Lord O'Hagan, in the case of *In re Meades* ⁽⁵⁾. In that case the father had engaged, as in the present case, that the children should be brought up as Roman Catholics; he had allowed the mother of these children every hour of her life to instil into them the doctrines of the Roman Catholic religion, and after the mother died, which she did when the children were six and seven years old, he had allowed the sister of the wife to continue in that course for three years more, until the children were in their tenth year, and then the father happening to marry again, made up his mind that the children should be brought up as Protestants. This was resisted by Mary Catherine Romayne, the maternal aunt of the minors, who presented a petition praying that the

(1) Jac., 266 n.

(2) 2 Bli. (N.S.), 124.

(3) 10 W. R., 245.

(4) 10 W. R., 400.

(5) Ir. Law Rep., 5 Eq., 98.

minors might be made wards of court, and for the usual inquiries and directions; and also that Robert Warren Meades, the father of the minors, might be restrained from in any way 58] interfering with *the religion or the religious education of the minors, the petitioner undertaking to have the minors maintained and educated in a manner suitable to their condition in life. Lord O'Hagan is a judge for whom I entertain the greatest possible respect. He is a Roman Catholic, as we all know, and he had here to decide whether the children should be brought up in the religion of the father, which was Protestant, or in the religion of the mother, which was Roman Catholic, and where there had been as positive an undertaking on the part of the father as could be given, which was not in controversy. Now Lord O'Hagan, on the subject of the duty of the father, expresses it thus⁽¹⁾, and every word of this is applicable to the present case: "The authority of a father to guide and govern the education of his child is a very sacred thing, bestowed by the Almighty, and to be sustained to the uttermost by human law. It is not to be abrogated or abridged, without the most coercive reason. For the parent and the child alike, its maintenance is essential, that their reciprocal relations may be fruitful of happiness and virtue; and no disturbing intervention should be allowed between them, whilst those relations are pure and wholesome and conducive to their mutual benefit." Then there is another passage, which is also very pertinent to this case. I asked Mr. Bagshawe if he could tell me of any instance where the father and the mother being both alive, the court has interfered against the parental authority of the father, and he has not succeeded in doing so. Upon that subject Lord O'Hagan says⁽²⁾: "I have said that, upon the affidavits I have no doubt as to the making of the promises imputed by the petitioner to the respondent. From the breach of it has arisen all the strife and bitterness which have destroyed the kindly relations once subsisting between the parties: and one can hardly avoid a feeling of natural regret that an engagement so solemn, so openly avowed, so strengthened by repetition, so confirmed by the consecration of the grave, should have been disregarded." Lord O'Hagan in that case came to the conclusion that it was his duty to have the children brought up, not in the religion of the mother, but of the father.

Now, in addition to these cases which I have mentioned 59] as *showing the universal doctrine of this court, there

⁽¹⁾ *Ir. Law Rep.*, 5 Eq., 103.

⁽²⁾ *Ir. Law Rep.*, 5 Eq., 111.

is the case of *In re Newbery* ⁽¹⁾, before Vice-Chancellor Stuart, and before the Court of Appeal ⁽²⁾, in which the same authority is acted on; and finally, there is the case of *Hawksworth v. Hawksworth* ⁽³⁾, where the child had been brought up as a Roman Catholic by her mother, and yet at the age of seven or eight the decision of the court was plain and distinct that she must be educated in the faith of her father; and that was not while the father was alive, but after he was dead, because that is the rule of this court, which is never departed from except under extraordinary circumstances.

Then Mr. Bagshawe very much pressed upon me that it was necessary to come here because the father had threatened to send his children to a Protestant clergyman, to be brought up in the Protestant religion. He has told his wife that she may go and see the children when she thinks fit, and he has given her the freest access to them provided that she will not interfere with their religious training. But I have not to decide on that point, because Mr. Agar-Ellis has submitted his children to the jurisdiction of this court by voluntarily making them wards of court some months ago, and he has taken out a summons in my chambers asking for directions in what manner the children are to be educated and where they are to go; that summons stands adjourned to come on before me. Therefore any question of the father exercising any harsh power may be dismissed.

Mr. Bagshawe says it comes under Lord Chelmsford's Act, and he refers me to *In re Taylor* ⁽⁴⁾, before the Master of the Rolls, which case decides nothing more than I have decided in several cases, namely, that when the father abandons his parental duty, deserts his wife and takes the children away, the children will be delivered to the mother and retained by her till they are sixteen; but in this case the father has never taken the children away. Surely, before you apply under this act the father must do something showing a positive intention to take them away; and I am clearly of opinion that this act of Parliament has no application. Therefore my opinion is, that, upon the general doctrine of the court, this petition is wholly unsustainable. It is a petition by the mother asking the court to interfere with the parental authority of the *father where there [60 has been no impropriety of conduct, and not a syllable alleged against the father; such a petition, therefore, must necessarily be dismissed.

⁽¹⁾ Law Rep., 1 Eq., 431.

⁽²⁾ Law Rep., 1 Ch., 263.

⁽³⁾ Law Rep., 6 Ch., 539.

⁽⁴⁾ 4 Ch. D., 157; 19 Eng. R., 741.

But in truth the petition has rested on this, that Mr. Agar-Ellis promised, before the marriage, that the children should be brought up as Roman Catholics. Now, I have written down the result, in a very few words, of all the cases, and they amount to this—that a promise by the father that his children should be brought up in a religion other than his own is thoroughly settled not to be binding. For that, I think, I will take the first case of *In re Browne* (¹), which is a remarkable decision by Sir Cusack Smith, the Master of the Rolls in Ireland, and has been commented upon and cited, but always with approbation, in which he came to this conclusion, as the marginal note very distinctly expresses: “A father has a right to direct and regulate the religious faith in which his child should be brought up, and the court will not interfere with that right unless there is an abuse of parental authority. To insist on bringing up the child in his own religion, notwithstanding a verbal agreement to the contrary, entered into before marriage with his wife, is not an abuse of parental authority which will induce the court to interfere. Testamentary guardians appointed by the father have the same right to direct the religious education of a child according to the father’s wishes. A contract entered into before marriage that the children shall be brought up in a particular religion is not binding on the husband, and cannot be enforced in a court of equity.” Sir C. Smith in his judgment says (²): “How can the court enforce the performance by the father of the child of such a contract? Is the court to separate the child from its father to prevent a violation of the contract? Is the court to separate the husband and wife, and place the children with the wife, to enable her to educate them in the faith which she professes, and in which the husband contracted the children should be brought up? Who is to provide the funds to educate the child in the religion which the father objects to? Is the court to apply the property of the husband during his lifetime, and against his will, to the education of his child in that form of religious faith from which he conscientiously differs, and the adoption of which by the child [61] he believes will be *destructive to his eternal welfare? By what process is the property of the husband to be sequestered for such purpose? Is the court to pronounce a decree or order against the husband, who, from the purest and most conscientious motives, does not perform his agreement? And is the court to issue an attachment against him and lodge him in gaol for his life, unless he consents that

(¹) 2 Ir. Ch. Rep., 151.

(²) 2 Ir. Ch. Rep., 160.

his child shall be brought up in that religious faith which he believes to be unscriptural and erroneous, and furnishes the funds necessary for that purpose? No doubt, if a father were to permit his children to be brought up in that form of the Christian religion from which he dissented, until they had arrived at that period of life when they would be capable of forming and entertaining particular religious views, the court might interfere?" That was the ground on which I refused to interfere, and on which the Court of Appeal refused to interfere in *Andrews v. Salt* (¹), where the father had not only agreed that the child should be brought up as a Protestant, he being a Roman Catholic, but he allowed the child to be baptized in the Protestant faith, and allowed her to be educated, and after his death her Roman Catholic relatives had allowed her to be educated in the Protestant religion, until there was such an amount of acquiescence that I thought I was justified in saying they had no right to interfere; and in that I was confirmed by the Court of Appeal, who gave even stronger reasons than I did for taking that course.

Therefore I come to the decision in this case that the father, however absolutely he may have promised, is at liberty to revoke it. He may alter his own views. He may not have cared much about religion when he married, but if he afterwards thinks more of religious subjects he is at liberty to say, "I conscientiously dissent from the tenets of the Roman Catholic church," or the converse, for it makes no difference, and I must have my children brought up in that form of religion which I alone can sanction. Lord O'Hagan, in the case I have referred to, adopts to the fullest extent the opinion of Sir Cusack Smith in *In re Browne* (²), that the promise of the father is absolutely null, and cannot be in any way enforced. The latest authority on this subject is the case of *Andrews v. Salt*. In that case Lord Justice Mellish, who *delivered the judgment of [62 Lord Justice James and himself, said (³): "The first question we shall consider is, what is the legal effect of an agreement made before marriage between a husband and wife of different religious persuasions, that boys should be educated in the religion of the father and girls in the religion of the mother? We are of opinion that such an agreement is not binding as a legal contract. No damages can be recovered for a breach of it in a court of law, and it cannot be enforced by a suit for specific performance in

(¹) Law Rep., 8 Ch., 622, 636; 6 Eng. R., 586.

(²) 2 Ir. Ch. Rep., 160.

(³) Law R., 8 Ch., 636; 6 Eng. R., 568.

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equity. We think that a father cannot bind himself conclusively by contract to exercise in all events in a particular way rights which the law gives him for the benefit of his children and not for his own. We entirely agree with the decision of the Lord Chancellor of Ireland in *In re Meades* (")."

In *Andrews v. Salt* (2) the guardians had allowed the children to be brought up in a certain way, and so they did in *Stourton v. Stourton* (3), where the father was a Roman Catholic and so was the mother, but the mother became a Protestant, and the guardians allowed the children to be brought up as Protestants till they were nine years of age, and there was that kind of acquiescence which the court thought made a different case, and there the court did not think fit to interfere with the discretion of the mother. Therefore, the only ground on which this petition could be supported entirely fails, because the law is absolute that any engagement by a father to have his children brought up in another religion than his own, however absolute, is null, and he is at liberty to revoke it, and to insist that his children in his lifetime shall be brought up in his religion, and to direct by his will that they should be so after his death. On these grounds I can come to no other conclusion than that the petition is unsustainable. These children must be brought up as Mr. Agar-Ellis may think fit, and, subject to any suggestion I may make in chambers when the scheme comes before me, he must do as he thinks fit with respect to their education.

There is one point I have not mentioned. My reasons for not seeing the children were, that in the view I have taken [63] it would *be useless, because I am convinced I must act upon the principle which Lord O'Hagan acted on, and say that they must be brought up in the religion of the father.

Glasse, Q.C., asked for an order in conformity with the order made in *In re Newbery* (4), following the decision in *Bligh v. Bligh*, Seton on Decrees (5).

A discussion then arose as to bringing on the summons in chambers, and in consequence of the near approach of the long vacation it was arranged by consent that an order should now be made upon the summons.

MALINS, V.C.: I dismiss the petition, and make an order upon the summons by the father that Mrs. Agar-Ellis shall not take the children without the consent of the father to a

(1) Ir. Law Rep., 5 Eq., 98.

(2) Law Rep., 3 Ch., 622; 6 Eng. Rep., 568.

(3) 8 D. M. & G., 760.

(4) Law Rep., 1 Eq., 431.

(5) 3d ed., vol. ii, p. 715.

Roman Catholic church, that she shall not take them to confession, and that she shall not inculcate in their minds the doctrines of the Roman Catholic church as distinguished from the Protestant. With regard to the custody of the children, I cannot interfere with the right of Mr. Agar-Ellis to do as he pleases with his own children. I intend my judgment to leave him master of his own house.

The order made was as follows:—

Dismiss the petition with costs.

Declare that the infant plaintiffs ought to be brought up in the communion, doctrines, and worship of the Church of England as by law established, and that the said infants ought to attend the public worship of the said church, and that they ought not to be taken to attend the Roman Catholic places of worship referred to in the said petition.

Order that the said Harriet Agar-Ellis be restrained from taking the said infants, or any of them, or causing or procuring or permitting the said infants or any of them to be taken, without the consent of the said Leopold G. F. Agar-Ellis, to confession, or to any church or place or places of worship where worship is performed otherwise than according to the rites and ceremonies of the Church of England as by law established.

Mrs. Agar-Ellis appealed.

The appeal came into the paper on the 8th of August, and the *court directed it to stand over till the November [64 sittings, making an interim order that the children should remain in the common house of the parents, both parents having access to them, with an injunction against Mrs. Agar-Ellis in the terms above; and a similar injunction against Mr. Agar-Ellis taking the children to Protestant places of worship without the consent of his wife.

The appeal came on to be heard on the 11th of November.

Sir H. S. Giffard, S.G., *Bagshawe*, Q.C., and *F. G. Bagshawe*, for the appellant: We do not deny that a father has power to retract a promise made on his marriage, that the children shall be brought up in a particular religion; but the existence of such a promise justifies the wife in endeavoring to secure its fulfilment. If the father retracts such a promise the court will consider the interests of the children when made wards of court, especially if the father has himself placed them under the jurisdiction of the court. If the court finds that the religious education of the children has been continued so long that they have acquired definite and fixed religious convictions, the court will respect those convictions, and refuse to allow them to be unsettled. And it will take this course irrespective of the manner in which, or the person by whom, the convictions have been instilled, or what the nature of the religious opinions may be.

[JAMES, L.J.: Would you say the same of the children of a Christian father who had been instructed without his knowledge in the Mahomedan religion? *Skinner v. Orde* (') bears upon this subject.]

Probably the court would not pursue the same course in such a case; for Christianity is part of the law of this country. But with respect to different forms of the Christian faith the court has repeatedly acted in this way, and the judge has, where he thought it necessary, himself examined the infants, to see if they had an intelligent understanding of the doctrines in which they had been instructed. In all these cases the welfare of the children is the main [65] question to be considered: *Creuze v. Hunter* ('); **Shelley v. Westbrooke* ('); *Colston v. Morris* ('); *Lyons v. Blenkin* ('); *Talbot v. Shrewsbury* ('); *Hunt v. Hunt* ('); *Re North* ('); *Stourton v. Stourton* ('); *In re Browne* ('); *Davis v. Davis* ('); *Hill v. Hill* ('); *Auslin v. Austin* ('); *In re Newbery* ('); *Hawksworth v. Hawksworth* ('); *In re Grimes* ('). The father's authority is a trust, not an arbitrary power: *In re Meades* ('); *Witty v. Marshall* ('); *Andrews v. Salt* ('). The father has submitted himself to the court instead of standing on his rights out of court, and the court is at liberty to do what it considers best for the infants. In *In re Grimes* and *In re Meades* the court saw the infants, and distinctly laid down that it had jurisdiction to interfere between father and child in a matter of religious education.

[THESIGER, L.J.: Is there any authority showing that the father by filing a bill can give up his parental authority to the court?]

To a certain extent his parental authority is thereby given up; for when the child becomes a ward of court its residence and custody cannot be altered without the consent of the court.

[BAGGALLAY, L.J.: If a girl of fifteen became a Roman Catholic and left her father's house, could he coerce her?]

We apprehend that compulsion would not be allowed.

[BAGGALLAY, L.J.: Suppose a boy said, "I will go to sea?"]

(1) Law Rep., 4 P. C., 60.

(2) 2 Cox, 242; Jac., 250 n.

(3) Jac., 266 n.

(4) Jac., 257.

(5) Jac., 245.

(6) 4 My. & Cr., 673.

(7) 2 Con. & Law., 373.

(8) 11 Jur., 7; 8 L. T., 309.

(9) 8 D. M. & G., 760.

(10) 2 Ir. Ch. Rep., 151.

(11) 10 W. R., 245.

(12) 10 W. R., 400.

(13) 34 Beav., 257.

(14) Law Rep., 1 Ch., 263.

(15) Law Rep., 6 Ch., 539.

(16) Ir. L. Rep., 11 Eq., 465.

(17) Ir. L. Rep., 5 Eq., 98.

(18) 1 Y. & C. Ch., 68.

(19) Law Rep., 8 Ch., 622; 6 Eng. R., 568.

The court would not allow its ward to do anything improper; but suppose the ward a girl, and the father wished to bring her up for a ballet-dancer, would the court allow it?

[JAMES, L.J., referred to *In re Lyons* (¹), where a Jewish girl went to reside with Christians, and the court refused to exercise *the chancery jurisdiction, but without prejudice to an application for a *habeas corpus*.] [66

[*Sir H. S. Giffard*, S.G.: The *habeas corpus* was ultimately refused, as she was above sixteen when it was applied for (²).]

The jurisdiction of the court is extended by 36 & 37 Vict. c. 12; and *In re Taylor* (³) shows the principles by which the court will be guided in exercising this extended jurisdiction. It is an abuse of parental authority for a father to turn round and alter the religious education of the children.

Davey, Q.C., and *G. C. Price*, for Mr. Agar-Ellis: We contend that the court will interfere with the authority of the father in two cases only: where he has abused it, or where he has for a length of time allowed the children to be brought up in a different way from that in which he now wishes them to be educated: so abandoning his authority. In the latter case, the father has acquiesced and permitted a state of things to grow up which cannot, without injury to the children, be disturbed, and so has disentitled himself to have his wishes attended to. There is no case in which the court has compelled a father, out of his own means, to bring up his children in a faith different from his own; and it was held in *In re Meades* (⁴), *In re Browne* (⁵), and *Andrews v. Salt* (⁶), that the court will not do so. Here there is no fund out of which the children can be maintained except the father's income, as no one on the lady's side offers to provide for them.

[JAMES, L.J.: Does not the father's application to the court do away with your objection as to the funds?]

It may well be that if the father declines to provide funds for any but a Protestant education the court may decline to make any order to help him; but we contend that the court will not make any order against him. Then as to the act 36 & 37 Vict. c. 12, it was intended to extend Mr. Justice Talfourd's Act, 2 & 3 Vict. c. 54; *Warde v. Warde* (⁷); and

(¹) 22 L. T. (N.S.), 770.

(²) 2 Ir. Ch. Rep., 151.

(³) See the *Queen v. Howes*, 80 L. J. (M.C.), 47.

(⁴) Law Rep., 8 Ch., 622, 636; 6 Eng. R., 568.

(⁵) 4 Ch. D., 157; 19 Eng. R., 741.

(⁶) 2 Ph., 786.

(⁷) Ir. L. Rep., 5 Eq., 98.

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was never intended to support a wife in disobedience to her husband; the petition therefore was rightly dismissed. 67] There is no case in which the court has *expressed an opinion during the life of the father as to the religious education of the children, except in cases of immorality or where the father has acquiesced in the children being brought up in a different religion. *In re Meades* (1) and *In re Grimes* (2) were cases of that kind. Here there has been no abandonment of the father's rights. Mr. Agar-Ellis directed his children to be brought up as Protestants, they had a Protestant nurse and then a Protestant governess, and he never knew that they were receiving any but a Protestant education. The wife was under no mistake as to the faith in which he wished the children brought up, but she secretly acted in opposition to his wishes. In *Lyons v. Blenkin* (3) Lord Eldon explains the jurisdiction. *In re Meades* and *In re Grimes* were strong cases of abandonment. The practice of the court seeing the children is not to be extended. It is a question of discretion whether the court will do it. In *Hawksworth v. Hawksworth* (4) the Vice-Chancellor expressed his regret that he had seen the child, and from the language of the Lords Justices on the appeal it is to be inferred that they would not have done what was done in *Stourton v. Stourton* (5). The practice tends to make mothers indoctrinate young children with controversial points, which is highly undesirable, and it furnishes an unsafe test as the children are sure to be prepared for the interview. It is said that it is an abuse of the father's authority for the father to turn round and alter the religious education of his children. It might be so if he capriciously turned round after a long period of acquiescence; but here he has not acquiesced, and he is the proper judge whether the scheme of education shall be altered, and it is not capricious for him to say that there shall no longer be a double mode of education. The term "abuse of the father's authority" means something quite different from this: *De Manneville v. De Manneville* (6). It applies to such a case as *Shelley v. Westbrook* (7), where the father was bringing up the children with no religious education at all, or *Wellesley v. Wellesley* (8), where the father was living an openly immoral life. Where the father is 68] *bona fide* exercising *his judgment the court will not

(1) Ir. L. Rep., 5 Eq., 98.

(2) Ir. L. Rep., 11 Eq., 465.

(3) Jac., 245.

(4) Law Rep., 6 Ch., 539.

(5) 8 D. M. & G., 760.

(6) 10 Ves., 52, 64.

(7) Jac., 266 n.

(8) 2 Bli. (N.S.), 124.

interfere with him, though it may think that its own discretion would have been exercised differently. If a father chose to give his son who was heir to a dukedom nothing but a mere elementary education, the court would not interfere. There is nothing, however, in the present case to show that the father is not exercising a sound discretion. The children have been subjected, unknown to him, to proselytising influences, and it is evident that there are other persons standing behind the mother. The court will give credit to the *bona fide* opinion of the father that it will be no injury to the children to be now brought up as Protestants. Then as to whether the court will see the infants, there is a wide difference between the position of a father and a testamentary guardian. The guardian stands in a purely fiduciary position, and is under no obligation to maintain the infants out of his own funds; he is therefore subject to the jurisdiction of the court in a different way from a father. This distinction is recognized in all the cases, and is clearly pointed out in *Andrews v. Salt* ⁽¹⁾. We do not deny the jurisdiction of the court to interfere during the life of the father, but the cases all show that it is to be exercised with great caution, and it never has been exercised except in cases of immorality or abandonment of the father's authority. The fact that the father himself makes an application to the court cannot give the court a more extended jurisdiction against him. We ask the court for an order to "strengthen the hands" of the father, according to the expression used by Lord Talbot in *Lord Raymond's Case* ⁽²⁾, in the case of a guardian. In *Todd v. Lynes* ⁽³⁾, the court compelled delivery up of a child to a testamentary guardian, and it must have the same power to interfere on behalf of a father. A deed by which a father gives up his power over his children is invalid: *Vansittart v. Vansittart* ⁽⁴⁾. The act 36 & 37 Vict. c. 12, s. 2, partially repealed that law, but that act only provides for cases where, on a separation, it is agreed that the children shall be given up to the mother. In other cases the law as laid down in *Vansittart v. Vansittart* is still in force, and it is there strongly laid down that for a father to delegate his power to another person *or to the court is *ultra vires*. It is said that [69 the children have acquired religious convictions, but what is called conviction in the case of children of these ages is merely the result of teaching and of predilection for the

⁽¹⁾ Law Rep., 8 Ch., 622, 636, 637.

⁽²⁾ Ca. temp. Talb., 58.

⁽³⁾ Cited in Simpson on Infancy, p. 134.

⁽⁴⁾ 2 De G. & J., 249.

teacher, and is not to be regarded in the same way as the conviction of an adult who weighs the arguments on both sides. *Nugent v. Vetzera* (') shows that the wishes of infants even at the age of fifteen or sixteen will not be regarded.

[JAMES, L.J.: That case turned on the duty of the court to recognize Austrian law as to Austrian infants.]

The case is analogous in principle to this. The court will not interfere with the legal right on account of the infant's predilections.

Sir H. Giffard, S.G., in reply: It is assumed on the other side that these children for years were brought up as Protestants, but the father must have been perfectly sure all along that they were receiving Roman Catholic instruction from their mother. The evidence shows that for two years there were scenes with them when their father took them to Protestant places of worship, and at last they refused to go. Now the court is asked to compel them to go whether they like it or not. Great danger of unsettling their religious views altogether will arise: *Witty v. Marshall* (').

[JAMES, L.J.: If the attempt to change a person's religious views is necessarily prejudicial to his moral and religious welfare, as tending to unsettle him, then all missionary efforts are wrong.]

The rights of the father are talked of in a fallacious way. The old cases lay down the law in a very peremptory way, but it is materially varied by the acts, and when once the jurisdiction of the court has attached by the infants becoming wards of court, the court has only to consider what is most for their benefit.

Nov. 23. JAMES, L.J., delivered the judgment of the Court (James, Baggallay, and Thesiger, L.JJ.):

The material facts of this case are few and undisputed. 70] On the *treaty for a marriage afterwards contracted between a gentleman and a lady of different religious persuasions the gentleman promised the wife and her friends that any children to be born of the marriage should be brought up in the lady's religious faith. There is some controversy between the parties as to whether this promise was not subject to or qualified by some private understanding between the husband and wife, but, for the purposes of this judgment, it is assumed to be an absolute, unconditional, and unqualified promise. After the marriage and immediately after the birth of the first child, the husband was minded to retract

(') Law Rep., 2 Eq., 704.

(') 1 Y. & C. Ch., 68, 73.

that promise and break that engagement, and from that time he has adhered, without the slightest wavering, to his determination that the children, of whom there are three—girls, of ages varying at the time of the commencement of these proceedings from nine and a half to twelve and a half years, should be brought up in his faith. The mother conceived herself to be warranted in disregarding her husband's express and positive wishes and commands as to the religious education of her daughters, and availed herself of all the opportunities afforded by the relations between a mother and daughters, who had never been separated, not only to impress their minds with the great cardinal truths and the religious and moral duties common to both modes of faith, but to instruct and indoctrinate them, so far as they were capable of receiving them, with the peculiar tenets constituting the characteristic difference of her own church, and to accustom them, as a matter of religious duty, to the performance of certain religious acts, the practical expression of those peculiar tenets, such as the adoration of the Virgin, the invocation of patron saints, and the practice of confession. It is not denied that this was done without the knowledge of the husband, except that he must, it is suggested, have known that these girls of tender years were in the habit of saying their morning and evening prayers at their mother's knee. Under the influence of this teaching, the children at last broke into open revolt against their father, and positively refused to obey his directions to go, as they had previously done, to his church.

Upon this the father determined to remove the children from his home and place them under tuition with persons of his own creed, to the end that they might be properly instructed therein, and *further determined to prevent the [71] access of the mother unless she promised not to speak to them on religious subjects. Hence the petition of the mother complaining of this threatened separation, and the suit at the instance of the father making the children wards of court, and, in effect, seeking the assistance of the court in the performance of his duty and the exercise of his rights as father.

On the wife's petition it appeared to the court unnecessary to hear the respondent's counsel. As between the husband and wife it is manifest that the wife could not, by a course of consistent and persistent disobedience to the husband's wishes and commands, give herself any right. It was conceded by counsel, and, in truth, it is on principle and authority settled so as to be beyond question or argument, that the ante-nuptial promise is, in point of law, ab-

solutely void. The husband had in the plainest terms expressed his determination so to treat it, and to assert and act upon his legal rights, the performance of which he is entitled to say he conceives to be his paramount paternal duty. As between the husband and the wife, therefore, the question is to be determined as if there had never been any such promise, and just as if she or her husband had embraced a new faith after the marriage. Under these circumstances there can, in our judgment, be no question that it is the husband's undoubted legal right to remove his children from the influence of a mother who is avowedly using that influence to thwart his wishes and plans as to their religious training and education, and to impose as a condition of her access to them a promise that she would not use that access for a purpose prohibited and lawfully prohibited by him, and that the wife, therefore, has failed to show any legal ground in support of her petition.

But the main argument before us has been, and has properly been, not on any question of conflict of rights between husband and wife, for there can be no such conflict as to the education of children, but as between the father and the children themselves, or as between the father and the law which is bound to protect the children from any abuse of the parental power. It is conceded that by the law of this country the father is undoubtedly charged with the education of his children. The right of the father to the *custody and control of his children is one of the most sacred of rights. No doubt, the law may take away from him this right or may interfere with his exercise of it, just as it may take away his life or his property or interfere with his liberty, but it must be for some sufficient cause known to the law. He may have forfeited such parental right by moral misconduct or by the profession of immoral or irreligious opinions deemed to unfit him to have the charge of any child at all; or he may have abdicated such right by a course of conduct which would make a resumption of his authority capricious and cruel towards the children. But, in the absence of some conduct by the father entailing such forfeiture or amounting to such abdication, the court has never yet interfered with the father's legal right. It is a legal right with, no doubt, a corresponding legal duty; but the breach or intended breach of that duty must be proved by legal evidence before that right can be rightfully interfered with.

It is contended that he does intend to commit such a breach of his duty, because he is about to disregard the

considerations on which several eminent judges have considered themselves bound to act in dealing with infants under the jurisdiction of the court. In *Stourton v. Stourton* (¹), the learned judges expressed themselves as follows: The Lord Justice Knight Bruce said (²), "At the close of the argument, I was unable to consider it otherwise than very possible that, notwithstanding the early age of this boy, his mother, a convert, might so effectually have availed herself of the full opportunity afforded by the paternal relatives as to have made religious impressions on his mind to a depth and an extent rendering dangerous and improper any attempt at important changes in them. It was my opinion, accordingly, and that, also, of my learned brother that we should have an interview with the lad." After stating what passed at the interview, the Lord Justice Knight Bruce added that the boy spoke in a manner "convincing me that the Protestant seed sown in his mind has taken such hold that if we are to suppose it to contain tares, they cannot be gathered up without great danger of rooting up also the wheat with them. Upon much consideration, I am of opinion that the child's tranquillity and health, his temporal *hap- [73] piness, and, if that can exist apart from spiritual welfare, his spiritual welfare also, are too likely now to suffer importantly from an endeavor at effacing his Protestant impressions not to render any such attempt unsafe and improper." And the Lord Justice Turner said (³), "Where, as in the present case also, the application to this court has been delayed, and the children have been suffered to receive religious impressions different from those which the father entertained, other and far more serious considerations present themselves—the wishes of the father may be in conflict with the well-being and even with the safety of the children,—and in order to ascertain whether this is the case or not it becomes necessary to see what is the extent of the impression which has been made upon the minds of the children, and to consider what may be the danger of disturbing that impression That the minds of children are capable at a very early age of receiving strong impressions upon matters of religion, as well as upon other matters, is not to be denied; and having seen the infant plaintiff in this case, and considered what passed at our interview with him, I am satisfied that his mind has received impressions, and strong impressions too, upon religious subjects, which are at variance with the faith which his father professed. I have felt bound to consider, therefore, what might be the result of

(¹) 8, D. M. & G., 760.

(²) 8 D. M. & G., 767.

(³) 8 D. M. & G., 772.

disturbing those impressions. It was urged at the bar that the opinions of a child so young could not be fixed, and that the impressions which this child has received might be removed by a different course of instruction and different associations. It might be so; but, on the other hand, may it not be that the impressions which have been formed might lead the instruction which would be given being received with carelessness or indifference, or, which would certainly not be less dangerous or less destructive to the character of this boy, with affected acquiescence? May it not be that the attempt to force upon this child a different faith might end in unsettling his existing impressions, and substituting no fixed impressions in their place. I much fear that it would be so." And the same thing in substance has been said by other judges in other cases.

We are asked in this case ourselves privately to examine 74] the *children, and to satisfy ourselves by that examination that these children, of the ages I have mentioned, have, to use the language of *Stourton v. Stourton* (¹), "received religious impressions to a depth and an extent rendering dangerous and improper any attempt at important changes in them," and so to satisfy ourselves that the father is about to abuse his parental authority by seeking to disturb such religious convictions. With all respect to the eminent judges who decided *Stourton v. Stourton*, we should decline to examine a child of such very tender years as the child there was. The children here are, or at all events the eldest is, considerably older than the boy there was. But that case was the case of a testamentary guardian, a case of mere and pure trust, which is essentially under the jurisdiction of the court, and under a jurisdiction always exercised with the widest judicial discretion. And the same is to be said of all the cases in which the court has acted in the like manner. In some of the cases cited to us the judges in Ireland did examine the children, even where the father was the respondent, but in the result left the father in possession of his legal right; and even in those cases a ground was laid for the jurisdiction by reason of the father's previous conduct in respect of the children's education bringing it within the category of abdication. It is not, in our judgment, necessary further to examine those cases, because, in our judgment, however weighty, and they are very weighty, the considerations expressed in *Stourton v. Stourton* and the other cases, they are weighty considerations for the father to deal with, without being subject to appeal to or revision by this court. If a

(¹) 8 D. M. & G., 760.

good and honest father, taking into his consideration the past teaching to which his children have been, in fact, subject, and the effect of that teaching on their minds, and the risk of unsettling their convictions, comes to the conclusion that it is right and for their welfare, temporal and spiritual, that he should take means to counteract that teaching, and undo its effect, he is by law the proper and sole judge of that, and we, as judges of the land, have no more right to sit in appeal from the conclusion which he has conscientiously and honestly arrived at than we should have to sit in appeal from his conclusion as to the particular church his children should attend, the particular *sermons they [75 should hear, or the particular religious books to be placed in their hands. He is quite as likely to judge rightly as we are to judge for him. At all events, the law has made him, and not us, the judge, and we cannot interfere with him in his honest exercise of the jurisdiction which the law has confided to him.

This being his right, has the father abdicated such right and submitted the whole matter to the judgment of the court by being himself party as next friend to the institution of the action making the children wards, and himself seeking the directions of the court as to their education? We are of opinion that if the father had the power so to delegate his duty, which we doubt, it would not be fair or right to hold that he had unwittingly surrendered his right by a proceeding evidently taken for the enforcement of it, and for obtaining the assistance of the court in vindication of it.

We come now to the consideration of the last point, and the only point on which we have any doubt—viz., whether the court should interfere at all; whether the court, recognizing the father's undoubted right as master of his own house, as king and ruler in his own family, can be called on by him to be ancillary to the exercise of his jurisdiction, and whether he ought not to be left to enforce his commands by his own authority within his own domain; and that was throughout the argument and at the close of it the very strong inclination of our opinion. We felt and feel a difficulty about the court's enforcing an order of a private person which it disclaims the right of examining. But it is not a question between the father and the court; it is a question of the wards. And, being of opinion that the father has retained his right to direct the religious education of his children, and the father being minded that they should not be taken to mass, confession, or the like, the

causing or permitting them to be so taken, in direct disobedience to the father's commands, is a wrong to them as well as to him. I perceive that the injunction is confined as follows: That the mother be restrained from taking the said infants or any of them, or causing, procuring, or permitting them or any of them to be taken, without the consent of the father, to confession, or to any church or place 76] or places of worship *where worship is performed otherwise than according to the rites or ceremonies of the Church of England as by law established,—and that injunction is in accordance with precedents which have been produced to us. The court has in other matters and under other circumstances protected wards by strengthening the hands of guardians, and it is safer not to disclaim or narrow its right or duty in that respect. We think, therefore, that the injunction of the Vice-Chancellor ought to be sustained. But, having regard to the ground on which we base our decision on the main subject—viz., the power and jurisdiction of the father—we think the declaration ought to be omitted, so as to throw on the father the whole responsibility of doing now, and during the remaining years of his children's respective minorities, what is right and proper. He ought to discard, and we have no doubt will discard, all thought of personal dignity or personal supremacy or of triumph in a personal struggle. The law trusts to him that he will, rising above all such petty feelings, have a sole regard to what he conscientiously believes to be for the temporal and spiritual welfare of his children; and we, pronouncing what we deem the law to be, must leave the matter to his sense of parental duty and to his conscience.

Solicitors: *Bowlings, Foyer & Hordern; Harting & Sons.*

See 19 Eng. Rep., 224 note.

The court, in a proceeding for divorce, may direct that the person to whose custody a child is given shall give a bond to produce it in court whenever a judge may direct: *Derringer v. Derringer*, 10 Phila. Rep., 190.

In an action for limited divorce brought by the wife against the husband, the court, after it has denied the principal relief sought, on the ground that the evidence failed to show facts to establish any of the causes for which a separation can be adjudged, has no power to give judgment awarding the custody of the children of the marriage to the plaintiff, and making provision

for their maintenance out of the property of the husband; upon failure to make out a case for a divorce, the defendant is entitled to judgment dismissing the complaint: *Davis v. Davis*, 75 N. Y., 221.

The father is the legal custodian of the minor children, and they will not be taken from his custody without the strongest reasons therefor; and this right is not affected by the voluntary separation of the parties: *Latham v. Latham*, 30 Gratt., 307, 332; *Bowles v. Dixon*, 32 Ark., 92.

The father is not bound by proceedings in the probate court, appointing a guardian for his child, to which he is not a party. Chancery has jurisdic-

tion to take the child from the statutory guardian and restore it to the father : *Bowles v. Dixon*, 32 Ark., 92.

Where, in a suit for a divorce, a wife asked for the custody of two daughters of the marriage, aged five and nine years, and it was found that the husband was of good moral character and attached to the children, but from business incapacity and failure to find employment was unable to support them, but that his mother and sister, who had abundant means and were of the best character, were willing to assume the expense of their support and education, it was held, that it was not a case where the court ought to give custody of the children to the wife on the ground of the unfitness of the husband for their custody : *Bennett v. Bennett*, 43 Conn., 313.

In case of a separation between husband and wife the court, in awarding the custody of an infant child to its father or its mother, will consult the welfare of the child rather than the rights of either parent.

Hence, where it appeared that the character and circumstances of either parent would secure the child's education, and the satisfaction of its physical wants, but the child was a delicate female infant of four years :

Held, that the child should, for the time being at least, be placed in the custody of its mother : *McKim v. McKim*, 12 R. I., 462.

Considerations affecting the health and welfare of a child may justify a court in withholding the custody of it temporarily even from its legal guardians; and they are so purely matters of discretion with the court of original jurisdiction, that this court will not review the conclusions thereon, unless some manifest error or abuse of discretion is made to appear : *Matter of Welch*, 74 N. Y., 299.

Where the father is dead, and the mother an unsuitable person to take charge of her children, the court will appoint a guardian for that purpose, and such guardian can retain the legal custody of the children as against the mother : *Com. v. Bigelow*, 1 Leg. Chron. Rep., 291.

1. By statute (Rev., p. 318), when the parents of minor children live apart, the court may, on petition of either parent, make a decree concern-

ing the custody, etc., of such children; the parents' rights, in the absence of misconduct, are deemed equal, and the happiness and welfare of the children determine the question of their custody. A decree of divorce for cruelty, granted in this court on the application of a wife, who had previously separated from her husband, was reversed by the court of appeals. Held, that her refusal to return to her husband afterwards was not "misconduct" within the meaning of the act.

2. Where, under the above circumstances, a daughter eight years old and a son ten, preferred to remain with their mother, and she was able to provide adequately for their maintenance and education, and was, in all respects, fit to have charge of them, the court refused to change the custody, making reasonable regulations for their father's access : *English v. English*, 31 N. J. Eq., 543, affirmed 32 N. J. Eq., 788.

If the application by the wife for divorce is refused,—if the court is satisfied that she is the chief obstacle in the way of a reconciliation, and that the husband is, under all the circumstances, entitled to the custody of the child,—it is impossible to impose terms upon him and to say he shall be compelled to have the child, under the decree of the court, at particular places and times, to gratify the wishes and feelings of the mother : *Latham v. Latham*, 30 Gratt., 307, 332.

A decree giving a wife the custody of her children is not erroneous because it makes no provision for the father to visit and see them. He may do this, without such provision, at convenient and proper times, in a decent and respectful manner, and without using improper influences to dissatisfy them with their mother. If he abuses the privilege, he may properly be deprived of the right.

If a father, after divorce by his wife, and a decree giving her the custody of the children of the marriage, is refused the right to see them, he may apply, under section 18 of the divorce act, for a modification of the decree, so as to secure a reasonable enjoyment of the right : *Burge v. Burge*, 88 Ills., 164.

The parental duty of giving personal care and protection to children is distinct from the duty to support them. A father is under legal obligation to

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provide for the support of his children, even if they remain with their mother after her divorce, and as against the public and the children, he cannot escape the duty.

Divorced persons agreed in writing, that certain of their children might stay with their mother as much of the time as they wished, but that she should make no claim against the father for their support, and in consideration of this, the father agreed that they might remain as aforesaid, and that he would, of his own free will, do for them towards their support, maintenance, and education, what seemed to him right, and at least would provide in store, pay and provision, each year for five years, an amount in value equal to fifty dollars. One child remained with its mother one year, another five, and another six, and she had to give them her personal care and protection. Held, that the father was bound to pay the mother fifty dollars a year for five years, not as support due the children, but as recompense to the wife for taking sole personal care of them: *Courtright v. Courtright*, 40 Mich., 633.

A divorce having been granted in favor of the wife, and the custody of three of the children awarded to the husband, and it having appeared that he was subsequently guilty of cruelly treating the children, it was held, upon an application of the wife for the custody of the children and alimony for their maintenance, that the application should be granted, and alimony awarded: *Boggs v. Boggs*, 49 Iowa, 190.

Where the court has to deal with the question of bringing up an infant in a particular religion, it will regard that of the father more than that of the mother. But in the case of an adopted child it will not interfere with the discretion of the adopted father; and will respect his preference when the funds for the infant's support come from him.

The court will regard the feelings and views of an infant of fourteen years of age, as to her religious education, if such views are definitely formed; and will take steps to ascertain her own independent views, if possible, apart from any extraneous

influences: *Matter of Pennington*, 1 Victorian Law Rep. (Eq.), 97.

It is the duty of the court to see that an infant is brought up in the faith of his or her father; but the mere fact that an infant was the child of parents belonging to the Presbyterian church, and that she had been brought up in the discipline of that body, is not of itself sufficient to warrant the reversal of the master's ruling approving of her being placed and educated at a seminary, the proprietress of which was a member of the Church of England, it being shown that means were provided for the regular attendance of pupils of the Presbyterian persuasion at that church, and the location of the school being such that it enabled the infant, who was of a delicate constitution, to have much more frequent intercourse with her friends and relatives, and there was a probability of a stricter personal supervision by the proprietress than at a public institution in another part of the county, which was in connection with the Presbyterian church in Canada: *MacNabb v. McInnes*, 25 Grant's (U.C.) Chy., 144.

On reference to the master to inquire as to a guardian and a scheme for the education and maintenance of an infant, he in deference to what he believed to be an opinion expressed by the court, and contrary to his own judgment, reported in favor of C. as sole guardian, and of W. as school mistress, both being of a different religion from that in which the child had for some years been educated. C., at whose school the child was, and who had for some years educated her in her own religion, excepted on the grounds that the child was attached to her; had strong religious convictions, and had formed friendships at the school. These exceptions being overruled, C. appealed to the full court against the scheme but not against the guardian, and the court, in the special circumstances of the case, reversed the order appealed from, set aside the report already made, and remitted the question to the master to be dealt with under the original order.

The conduct or misconduct of those who have had the custody of a child should in no way sway the master or the court in determining what is to be

done for the child's welfare, and if religious impressions, whether produced by fair or foul means have been formed, the child should not in any manner be coerced, or even persuaded to alter them: *Cleary v. McNamara*, 2 Victorian Law Rep. (Eq.), 49.

An orphan child was adopted by P., who, by his will, left property to trustees for her with a trust for her maintenance during minority. After the death of P. the child was taken possession of by C., a stranger, and retained against the will of the trustees. Motion by C. to be appointed guardian, and for an allowance for the child's maintenance and education out of the property held in trust for her, refused. An infant above the age of 12 years has no right to choose a guardian; nor to supersede the discretion of the trustees of her property devised under the will of her adopted father: *Matter of Pennington*, 1 Victorian Law Rep. (Eq.), 97.

1. As a general rule the parents are entitled to the custody of their minor children. When they are living apart, the father is *prima facie* entitled to that custody; and when he is a suitable person, able and willing to support and care for them, his right is paramount to that of all other persons except that of the mother in cases where the infant child is of such tender years as to require her personal care; but in all cases of controverted right to custody, the welfare of the minor child is first to be considered.

2. The father's right is not, however, absolute under all circumstances. He may relinquish it by contract, forfeit it by abandonment, or lose it by being in a condition of total inability to afford his minor children necessary care and support.

3. Where the father and mother, living apart, by agreement transfer the care and custody of their infant children to the grandfather of the children, in consideration that he will receive, care and provide for them, and in pursuance of such agreement he does take them in charge, the custody of the grandfather is lawful, and he has legal capacity to maintain an action for damages against one who wrongfully takes or causes them to be taken from his custody.

4. In such case the grandfather being entitled to the custody of the minors was also entitled to their services, and in an action for damages against one who wrongfully took them from his possession, it is sufficient to allege as to loss of services that the wrongful taking was to deprive him of their "possession and services" without alleging actual loss of services: *Clark v. Bayer*, 32 Ohio St., 299.

Where a child, after the death of his mother, was sent by the father to the grand parents in pursuance of an understanding that the latter should have the child to raise, it was held, upon an application of the father for the custody of the child, that the welfare of the latter should be considered, and that the application should be denied unless the father could show that he was able and likely to make suitable provision for it: *Drum v. Keen*, 47 Iowa, 435.

After the death of the father of an infant the claim of the paternal grandfather is not superior to that of the mother, though the child had been left in his custody for six years before the death of the father: *Matter of Sanders*, 6 Victorian Law Rep. (Law), 10.

Where the father, the week after the birth of his son, went to sea, and returning in a few weeks, found his wife had deserted him and her child, leaving the child at his grandfather's, where he was born, gave him to his grandfather, telling him he should never claim the child again, and he remained with the grandfather who took entire charge of him till his death, the father never afterward doing anything for his support: Held, that the child was emancipated: *Orneville v. Glen Burn*, 70 Maine, 353.

Where, upon the application of the father of an illegitimate child for the custody thereof, it appeared that his moral character was no better than that of the mother, and that she had a natural affection for the child, neither neglecting, abusing, nor failing to provide for it, it was held that the custody of the child should not be awarded to him: *Pratt v. Nitz*, 43 Iowa, 33.

When illegitimate infants are removed from the custody of a person to whom they had been committed by their mother at her death; held, that

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a person claiming to be the father of such infants had no *locus standi* to demand that they should be given up to him, they not having been taken out of his custody: also, that even if his paternity had been proved by corroborative testimony of the mother, during her lifetime, he would not have had any such right: *Matter of Bates*, 1 Victorian Law Rep. (Law), 178.

On the hearing of a petition, on the relation of the mother of an illegitimate child, for a writ of *habeas corpus*, to obtain the custody of such child, the judge found specially, that the relatrix was the mother of the child, that she had abandoned it voluntarily, that it then became an inmate of a duly incorporated asylum for orphans, that such asylum had placed the child in the custody of the defendant, that the relatrix had married and then demanded of the defendant the custody of the child, which was refused, that thereafter the asylum had apprenticed the child to the defendant, and that both the relatrix and defendant were proper persons to have the custody of the child:

Held, that the age of the child should have been found, but that on such findings of the judge, and the admissions of the parties as to its age, conclusions of law and judgment in favor of the relatrix will not be disturbed by the supreme court.

The relatrix in such case is the real party in interest, and therefore her husband is incompetent as a witness on her behalf: *Copeland v. State*, 60 Ind., 394.

Where judgment of divorce awards custody of a child of the parties to the father, and thereafter the mother abducts the child, and removes it from the jurisdiction of the court, the father cannot recover damages for such abduction and detention; and hence, the mother cannot be committed therefor as for a continuing contempt under

sec. 23, but the misconduct can only be punished criminally.

The court, in such a case, ordered the mother to restore the child to the custody of the father, and pay forthwith a fine of one dollar, and to stand committed to the county jail until she should fully comply with the order:

Held, that the order was in excess of the jurisdiction of the court, and the warrant of commitment "issued in a case not allowed by law," and the remedy by *habeas corpus* is applicable: *R. S.*, 1858, ch. 158, sec. 19; *Matter of Pierce*, 44 Wisc., 411.

The provisions of the Revised Statutes (2 R. S., 147, § 55), authorizing a decree for the support and maintenance of the wife, although a decree for separation be not made, only applies where cruel and inhuman treatment or other cause of divorce is made to appear to the court: *Davis v. Davis*, 75 N. Y., 221; *Cooper v. Cooper*, 4 Bradwell (Ills.), 285; *Tureman v. Tureman*, 4 Bradw., 385; *Atwater v. Atwater*, 53 Barb., 621, 36 How. Pr., 431; *Palmer v. Palmer*, 29 How. Pr., 390, 1 Buff. Superior Ct. R., 89; *Allardice v. Allardice*, 11 Week. Dig., 191.

See 4 Eng. Rep., 649, note; *P— v. P—*, 24 How. Pr., 197; *Manly v. Scott*, 6 Bridgman, 239; *Boyce v. Boyce*, 23 N. J. Eq., 337, 24 id., 588; *Galland v. Galland*, 38 Cal., 265, 9 Am. Law Reg. (N.S.), 463, 8 Am. Law Times Rep., State Courts, 254.

Where a decree of divorce has been obtained by a wife against her husband, and an allowance of alimony has been made for her support, and "for the support and maintenance" of her three children, without any clause for leave to apply to change the same; held, that the legislature intended that the allowance to the wife should be unchanged, but that the provision for the support of the children might be altered as their circumstances changed: *Kerr v. Kerr*, 59 How. Pr., 255.

[10 Chancery Division, 76.]

C.A., Nov. 14, 21, 1878.

Ex parte ODELL. In re WALDEN.

Bill of Sale—Registration—Inventory of Goods with Receipt for Purchase-money—Contemporaneous Agreement by Purchaser to let the Goods to Vendor—Bills of Sale Act, 1854 (17 & 18 Vict. c. 36), ss. 1, 2, 7.

C., on the 18th of July, advanced W., who had then an execution in his house, £150, which was employed partly in paying out the execution. An inventory was made of W.'s furniture, and at the foot of it W. signed a receipt for the £150, as "for the absolute sale" to C. "of the above-mentioned articles." On the same day a written agreement was entered into between C. and W. for the letting of the same furniture (specified in a schedule) by C. to W. for two months for £170, to be paid by W. to C. on the 18th of September, or such other time as might be agreed on. The agreement gave C. power, in case the £170 should not be duly paid, or if at any time during the continuance of the agreement the goods should be taken under an execution or distress, or W. should become bankrupt or take proceedings for [77] liquidation of his affairs or composition, or on the happening of some other specified events, to determine the agreement, and thereupon to take possession of the goods and to sell them. If upon a sale he should realize more than what was due to him under the agreement and his expenses, he was to pay the surplus to W.; if he should realize less, W. was to make good the deficiency. On the payment of the £170 and expenses the goods were to become the property of W.:

Held, that these two documents together constituted a mortgage to secure £170, and that they required registration under the Bills of Sale Act, 1854.

Thomson v. Barrett ⁽¹⁾, *Allsopp v. Day* ⁽²⁾, and *Byerley v. Prevost* ⁽³⁾ discussed and distinguished.

In August W. repaid C. £50, part of the £170. The balance of £120 was not paid when it became due on the 18th of September, and C. sent H. to take possession of the goods. Possession was taken, and it was then arranged that H. should pay the £120 to C. C. signed a receipt (indorsed on the hiring agreement of the 18th of July) and dated the 22d of September, for the £120 as "for the absolute sale" to H. of "the goods herein specified," and on the same day an agreement (similar to that of the 18th of July) was entered into between H. and W. for the letting of the furniture to W. for three months at a rent of £145, to be paid in three instalments in October, November, and December. The October instalment was not paid when it became due, and on the 6th of November H. took formal possession of the goods. But the goods remained in the apparent possession of W. until after he had committed an act of bankruptcy, upon which he was ultimately adjudicated a bankrupt. None of the documents was registered under the Bills of Sale Act:

Held, that, whether the transaction in September was a transfer to H. of C.'s interest as a mortgagee or an entirely new transaction, H. could stand in no better position than C. did, and that the trustee in the bankruptcy was entitled to the goods.

THIS was an appeal from a decision of Mr. Registrar Murray, acting as Chief Judge in Bankruptcy.

In July, 1877, J. B. Walden, a stockjobber in the city of London, had an execution in his dwelling house at Wimbledon. He applied to Mr. A. S. Cochrane, who traded as a banker under the name of the National Deposit Bank, to assist him to pay out the execution. On the 18th of July, 1877, two documents were executed. The first was an in-

⁽¹⁾ 1 L. T. (N.S.), 268.⁽²⁾ 7 H. & N., 457.⁽³⁾ Law Rep., 6 C. P., 144.

ventory of the furniture in Walden's house and at the foot of it was a receipt, dated the 18th of July, and signed by Walden, as follows:—

“Received of Mr. A. S. Cochrane the sum of £150, for the 78] *absolute sale to him of the whole of the above-mentioned articles of furniture and other effects.”

The other document was a memorandum of agreement, dated the 18th of July, and made between Cochrane of the one part, and Walden of the other part, which contained the following stipulations (*inter alia*):—

(1.) Cochrane agreed to let on hire to Walden, and Walden agreed to hire from Cochrane, the goods specified in the inventory thereto annexed for the term of two months from the day of the date of the agreement for the sum of £170, to be paid by Walden to Cochrane in manner following (that is to say), £170 on the 18th of September, 1877, or on such other extended days as might from time to time be agreed upon in writing between the parties until the whole of the £170 should be fully paid and satisfied.

(2.) In case the £170 should not be duly paid pursuant to clause 1, or if, at any time during the continuance of the agreement, the goods or any part thereof should be or become liable to be seized or distrained upon for rent or taxes, or under any execution against Walden, or if and in case Walden should, at any time whilst any money should remain due under the agreement, become bankrupt or file any petition for liquidation or composition of his affairs, or make any assignment for the benefit of his creditors, or permit or suffer any action, suit, or proceedings to be commenced and prosecuted, or any judgment for debt signed against him, or remove the goods or any part thereof from off his premises without the knowledge or consent of Cochrane first had and obtained in writing for any of the said purposes, it should be lawful for Cochrane at once to determine the agreement. And it was expressly agreed that it should thereupon be lawful for Cochrane to seize and remove the goods or any of them, and re possess the same, and to remain in possession of them, without any further consent on the part of Walden.

(3.) If and in case Cochrane should so seize and re-possess himself of the goods or any part thereof, he should, if he should think fit, sell the goods so seized, and, if he should thereupon realize a larger amount of money than the sum that should be actually due to him under the agreement, 79] together with all *expenses he might have incurred in

relation to the said seizure, removal, and sale, and also all costs, charges, and expenses he might have incurred or have sustained in relation to the goods, or to the agreement, or in defending or sustaining his title to the goods under the agreement, then the balance of the amount so realized should be paid by Cochrane to Walden. But, if the goods so seized should realize a less sum than the money then actually due to Cochrane, together with all expenses as aforesaid, then Walden should pay to Cochrane the amount of any such deficiency, and, in default of payment thereof being made, the same should be recoverable against Walden by Cochrane in like manner as if the same were money actually due and owing.

(7.) When and as soon as Walden should have paid to Cochrane the full amount of the £170, together with all costs, charges, and expenses that might be payable under the agreement, then the goods should become and be the goods of Walden.

At the foot of this agreement was written an inventory of the goods comprised in it, which was a copy of the inventory to which the receipt for the £150 was attached.

Out of the £150 Cochrane paid the amount of the execution to the sheriff, and paid the balance to Walden. On the 10th of August, 1877, Walden repaid Cochrane £50 on account of the £170. On the 18th of September, 1877, the balance of £120 became due, and was not paid by Walden. Cochrane thereupon instructed Mr. H. H. Wheatley, an auctioneer, to take possession of the goods, and he did so. An arrangement was then made that Wheatley should pay Cochrane the £120, and this was done on the 22d of September. A receipt, dated that day, was indorsed on the hiring agreement of the 18th of July, and was signed by Cochrane, as follows: "Received of Mr. H. H. Wheatley, the sum of £120 for the absolute sale to him of the whole of the goods, chattels, and effects herein specified." And the same day an agreement for the letting of the furniture by Wheatley to Walden was entered into, in terms similar to the agreement of the 18th of July, with this difference, that the letting was to be for three months from the 22d of September, for the sum of £145, to be paid in three instalments, on the 22d of October, the 22d of November, and the 22d of December, 1877. None of the documents *of the 18th of July or of the [80 22d of September was registered under the Bills of Sale Act. The instalment which became due in October was not paid by Walden, and Wheatley on the 6th of November put a man in possession of the goods. Shortly afterwards Wal-

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den filed a liquidation petition, and was ultimately adjudicated a bankrupt. The goods comprised in the agreements remained in his apparent possession until after the filing of the petition. In January, 1878, Wheatley sold the goods. The trustee in the bankruptcy claimed the proceeds of sale, on the ground that the documents of the 18th of July amounted to a bill of sale, and ought to have been registered. The Registrar held that registration was unnecessary, on the ground that the property in the goods passed by manual delivery, independently of the documents. The trustee appealed.

Marten, Q.C., and Warmington, for the appellant: The two documents of the 18th of July formed really one transaction—a mortgage—and therefore required registration, and so it has been recently decided by Lindley, J., in a case of *Cochrane v. Matthews* (¹), where two precisely similar 81] documents were executed, *the money being advanced by the same lender as in the present case.

(¹) 1878. Mar. 22.

COCHRANE v. MATTHEWS.

LINDLEY, J., gave judgment as follows:

I do not think it is necessary to look into the authorities any further.

I have come to the conclusion that these two documents ought to be regarded as one assurance. Now let us look at the substance of the matter before we look at it with reference to the language of the act. I take Mr. Cochrane's evidence as perfectly trustworthy and as stating exactly what was intended. But what was intended? I shall not put it in his language, but to my mind it is quite plain from his evidence that it was not intended that he should buy this property with the view of keeping it, but that he should buy it and keep it locked up in his own name in order and with the view to render it a security to him for the money which he was advancing. That is to say, the form in which he proposed to do that was not to take an ordinary mortgage, but the particular machinery by which he desired to effect his intention was that he should acquire the property and re-demise it. That was the machinery. And I take it he is quite right in saying it was intended that the property should pass when the receipt was taken, but it

passed to him on an agreement that he should re-demise it. In other words, before the money was paid the whole transaction was arranged that the property should be sold to him, and that he should pay £50. To my mind it is plain that Cochrane could not have stopped there and have claimed the property, without being guilty of a gross breach of faith. It would have been a gross breach of faith to the borrower. He could not have carted away the property at the next moment. In this sense it was his property that he might re-demise it; in other words, it was his as a security for the money. That, of course, was not at all set out and expressed in the receipt. But the receipt is not a pure receipt for £50; it follows an inventory; it is: "Received the sum of £50 for the absolute sale of the above-mentioned articles of furniture and other effects." Well, "absolute sale" is quite right in one sense, but it is not right in another sense. It was an absolute sale for the purpose of certain arrangements; it was not an absolute sale without conditions. I quite agree with Mr. Lane that I am not at liberty to hold these instruments void under the Bills of Sale Act simply because they have been drawn with the view of evading the act. As I understand the law, any one is at liberty to evade an act in one

Sects. 1, 2, and 7 of the Bills of Sale Act, 1854, apply: *Hale v. Saloon Omnibus Company* ('); *Phillips v. Gibbons* ('). Cochrane never became the absolute owner of the goods; there was nothing but a mortgage to him. The second transaction in September was nothing but a transfer by Cochrane to Wheatley of his rights as a mortgagee, and gave Wheatley no better title than Cochrane himself had. Or, if it was a new mortgage, it equally required registration. An assignment by the grantee of his interest under a bill of sale comes equally with the original bill of sale within the provision of 29 & 30 Vict. c. 96, s. 4, requiring re-registration after the expiration of five years: *Karet v. Kosher Meat Supply Association* ('). The goods always remained in the apparent possession of Walden until after

sense of the word, that is, he is at liberty to do things which are not hit by the act, which do not come within the act when properly construed. If the act is so worded as to affect a certain transaction, anybody is at liberty to have recourse to other transactions which do not come within the act. In that sense any one is at liberty to evade an act. But we must look at the real and true construction of the act. I am of opinion that this transaction is clearly within the language of the act, as well as within what may be called its spirit. It appears to me that the evidence of Mr. Cochrane is conclusive upon this, that these two pieces of paper are portions of one transaction, and you cannot separate them as if they were unconnected with each other. They constitute one transaction just as much as if the two pieces of paper had been one piece of parchment. The mere fact that the one piece of parchment is divided into two documents, one in the form of a receipt and one in the form of a re-demise, cannot make them separate transactions. The two together show what the transaction was. It would not have been fair to either of the parties to have fastened upon the one piece of paper without looking at the other. The true evidence of the one transaction is the two pieces of paper, and those two together form, in my opinion, one assurance of these chattels. Then, taking that view of the case, it falls within the exact words of the definition clause (sect. 7) of the Bills of Sale Act. It appears to me that is the true view of the case,

that the two documents form one assurance within the meaning of sect. 7 of the act.

Now with reference to the authorities—the only one to be considered is *Thomson v. Barrett* (1 L. T. (N.S.), 268). *Phillips v. Gibbons* (5 W. R., 527) supports the view which I take. Here no doubt there are two pieces of paper, but one cannot fritter it away by saying the transaction is to be regarded differently accordingly as part of it is on one piece of paper and part of it on another, or because one part may be on blue paper and another on white paper. That is a piece of the machinery; the two documents are so worded that they together form one transaction just as much as if they were on one piece of paper only. In *Thomson v. Barrett* there was only one piece of paper, and the rest was all verbal. It was impossible to say, therefore, upon the true construction of it, that that one piece of paper was an assurance of anything. I do not see anything in *Thomson v. Barrett* inconsistent with the view I take, that the two documents in the present case ought to be construed and treated for all purposes as one, and that they cannot be treated as separate documents without doing that which would be contrary to the intention of both parties. It appears to me that this is an assurance within the Bills of Sale Act, and my judgment, therefore, must be for the defendant.

(¹) 4 Drew., 492.

(²) 5 W. R., 527.

(³) 2 Q. B. D., 361.

the act of bankruptcy had been committed: *Ex parte Lewis* ('). *Thomson v. Barrett* (') will probably be cited against us, but it is distinguishable. There a receipt was given for the purchase-money of a barge, and it was relet by the purchaser to the vendor. But the purchaser's name was painted on the barge, and, moreover, the jury found that there was a *bona fide* sale, and that the document was not a record of the transaction in case the matter should be afterwards called in question, but a mere receipt for the purchase-money.

E. C. Willis, for Wheatley: On the 18th of July the sheriff was actually in possession and could have sold, and Cochrane found the money to get rid of him. The sale was in substance made by the sheriff to Cochrane. At any rate, there was an out and out purchase by Cochrane, though there was a simultaneous agreement by him to relet the goods to Walden. If registration was necessary, which of 83] the two documents *ought to have been registered, or should both have been registered? The mere fact that there was a right of redemption given to Walden makes no difference, for the act requires that every bill of sale, absolute or conditional, should be registered. A mere receipt for purchase-money cannot require registration.

[JAMES, L.J.: In *Evans v. Prothero* (') it was held that an insufficiently stamped receipt for purchase-money might be received as evidence of a contract to purchase land.]

In *Thomson v. Barrett* ('), *Allsopp v. Day* ('), and *Byerley v. Prevost* ('), it was held that a mere receipt for the purchase-money of goods did not require registration under the act. It has not been suggested that the hiring agreement required registration. It amounts to an admission by Walden that Cochrane was then the absolute owner of the goods; this admission binds Walden's trustee. The first document did not pass the property in the goods; it had already passed by delivery.

[THESIGER, L.J.: The act applies to documents which do not pass property.]

In *Allsopp v. Day*, Wilde, B., was disposed to think a bill of sale means an instrument by which the property passes. In September Cochrane took possession of the goods, as he was entitled to do under the hiring agreement, and he had a full right to sell them. There is no evidence of any fraudulent arrangement between him and Wheatley.

(') Law Rep., 6 Ch., 626.

(') 1 L. T. (N.S.), 268.

(') 1 D. M. & G., 572.

(') 1 L. T. (N.S.), 268.

(') 7 H. & N., 457.

(') Law Rep., 6 C. P., 144.

Wheatley bought the goods out and out, and Walden was cognizant of this transaction. Wheatley could only register his documents as against Cochrane, who is not a bankrupt. No doubt the only distinction between the present case and *Cochrane v. Matthews* (1) is the second purchase of Wheatley, but it does not appear from the judgment of Mr. Justice Lindley that either *Allsopp v. Day* or *Byerley v. Prevost* was cited to him.

Marten, in reply: In *Allsopp v. Day* the inventory did not form part of the receipt, as in the present case. The circumstances, too, were very different, *and moreover [84 *Phillips v. Gibbons* (2) was not cited, and the special case on which the court decided stated that there had been a previous purchase. But since then it has been held that a mere agreement for a bill of sale, if it is relied upon as an equitable assignment, must be registered: *Ex parte Mackay* (3); *Edwards v. Edwards* (4); *Brantom v. Griffiths* (5).

E. C. Willis, in reply: In each of the cases last cited there was an equitable assignment in writing; not, as here, only a document which at the most is but evidence of a prior assignment.

JAMES, L.J.: I think on the whole that we must adopt the decision of Mr. Justice Lindley, and hold that the original document was a bill of sale within the meaning of the act, and required registration. No doubt the case of *Allsopp v. Day* (6) is very strongly in favor of Mr. Willis's argument. There there was a receipt for purchase-money very much in the same words as here, only differing, I think, from the one before us in this respect, that the inventory of the goods was inclosed with it, and was not part and parcel of the same document as it is here. But there was also this difference, which Mr. Marten has pointed out, that the special case stated an actual purchase, and an actual payment of the purchase-money independently of the receipt, which was only added in the subsequent statement of the facts. I do not know whether those differences are very material, but if it is necessary, I am bound to state that I should not be prepared to affirm that decision. I cannot help thinking that one particular view of the case was not presented to the mind of the court, and that is the view which is suggested by *Evans v. Prothero* (7), that is to say, whether such a document as this did not amount to

(1) *Ante*, p. 526 n.

(2) 5 W. R., 527.

(3) Law Rep., 8 Ch., 643.

(4) 2 Ch. D., 291.

(5) 2 C. P. D., 212; 20 Eng. R., 475.

(6) 7 H. & N., 457.

(7) 1 D. M. & G., 572.

something more than a receipt, whether it did not amount to a complete memorandum of agreement. Then, if this document—the receipt—in itself was not at law sufficient to 85] transfer the property in the goods, it may *have been sufficient to show that the one party was transferring, and the other receiving the goods. But, if it did not pass the property at law, beyond all question, in my view, it was sufficient to confer on the person to whom it was given, i.e., Mr. Cochrane, a perfectly good equitable title to the goods, which title he could have enforced in equity if necessary, independently of the statute. The cases to which Mr. Marten referred as to the effect of equitable titles, had not been decided when *Allsopp v. Day* (¹) was before the Court of Exchequer. I do not know, however, that it is necessary for the decision of the present case to deal with that point, because what we have got here is the evidence of two contemporaneous documents, both executed as part and parcel of the same transaction, as much contemporaneous as it is possible for two documents to be, and those two documents together constitute the real transaction between the parties. The real transaction which took place, as evidenced by the two documents now before us, was a bill of sale of goods for the purpose of securing a debt, the goods being in truth and in substance redeemable upon the payment of the debt with the interest thereby stipulated. The form adopted, a sale and a demise, seems to me to be wholly immaterial. The goods before the execution of the two documents were the goods of Walden. After the execution of the two documents they remained still in equity the goods of Walden, subject to a charge upon them for the money which was advanced by Cochrane by way of loan, and, it being advanced by way of loan, the goods were redeemable on the payment of the loan with interest. The two documents are the true record of the transaction, and they show by themselves, without any other evidence, that the goods were originally Walden's goods, and that they became, either at law or in equity, by means of these two documents, Cochrane's goods, as mortgagee, but liable to be redeemed by Walden. The two documents, therefore, constitute, in fact, a bill of sale with a defeasance upon redemption. That being so, it appears to me that they are within the very words of the Bills of Sale Act, and required registration.

Then, was that original transaction affected by the subsequent transaction between Cochrane and Wheatley? Now

(¹) 7 H. & N., 457.

there is no *evidence of any sale by Cochrane to [86 Wheatley except the receipt for the purchase-money. I do not in the slightest degree doubt that the money passed, but there is no evidence of the passing of the goods from Cochrane to Wheatley, except the receipt. The receipt is, "Received of Mr. H. H. Wheatley the sum of £120 for the absolute sale to him of the whole of the goods." At the same time the letting agreement was handed over, and the receipt was indorsed on it. There was no sale by Cochrane under the power contained in the agreement. It was a mere payment by Wheatley of exactly the sum due to him, £120. There was a request made by Walden to Wheatley to do it, to take the thing off Cochrane's hands. That, in my opinion, was merely a transfer to Wheatley of Cochrane's rights as mortgagee, and Wheatley cannot put himself higher than Cochrane could have done. He is claiming through Cochrane, under Cochrane's bill of sale, which was not registered. The want of registration affects Wheatley, the assignee, exactly as it did Cochrane, the assignor, and as there was never any cesser of the apparent possession of Walden before the act of bankruptcy took place, the title to the goods is now as bad in Wheatley as it would have been in Cochrane. That being so, I am of opinion that the title of the trustee is good as against Wheatley, and therefore the order of the Registrar must be reversed, and an order made that the respondent do pay the proceeds of sale to the trustee.

BAGGALLAY, L.J.: I am of the same opinion. I think it convenient to consider the transactions of the 18th of July and the 22d of September separately. I think it is impossible, having regard to all the circumstances, not to treat what took place on the 18th of July in effect as one transaction. Under what circumstances was that transaction entered into? Walden had an execution in his house, the sheriff was in possession, and he applied to Cochrane to free him from that execution. He asked him to pay out the amount of the execution, something like £106, and to advance him or pay him a further sum of money for his own purposes. Whereupon what took place was this: there was an apparent sale of the goods to Cochrane for £150. On the same day Cochrane let all this furniture to Walden for £170, not £150. He let it for two months, the money to be *paid at the expiration of the two months, or at such [87 other time as should be agreed upon between the parties. The agreement then provides that, if that money is not paid, or if there is a liquidation petition by Walden, or a bankruptcy, or in the event of any of a variety of other circum-

stances, Cochrane shall have power to take possession of the furniture, and to sell it. Then there follows this remarkable provision, that, if the sale produces more than £170, Walden is to receive the surplus; but if, on the other hand, it does not produce the full amount of £170, Walden is to make up the difference to Cochrane. That is utterly inconsistent with a sale and letting as ordinarily understood. It is impossible to look at the transaction as anything else than a loan of £150 for two months, the additional £20 being interest for the money so borrowed. If that be the nature of the transaction, taken all together, I do not see that it makes any difference that it is contained in two documents instead of one. You cannot defeat the operation of the Bills of Sale Act by putting part of a transaction in one document and the other part in another document. Taken as a whole the transaction clearly falls within the provisions of the 1st and 2d section of the act; the one requiring the registration of the bill of sale, and the other requiring the registration of the document containing the conditions or defeasance. Therefore both documents should have been registered as a bill of sale. Together they constitute a bill of sale with a defeasance.

Then what was the effect of the transaction of the 22d of September? I must confess that I was at one time pressed with the view urged by Mr. Willis, that the right to exercise the power of sale had arisen, and that Cochrane exercised it, and that, he having done so and sold to Wheatley, Wheatley's title was established. But there again we must have regard to the transaction taken as a whole. If there had been no re-letting by Wheatley to Walden, there might have been perhaps some ground for the contention of Mr. Willis. But you find that on the same day, directly the transfer of the goods is made to Wheatley by Cochrane, Wheatley enters into another letting agreement with Walden, again on a further advance, representing it as a letting for three months, and that the amount is to be paid again by instalments. Surely that must have been a matter of 88] arrangement *between not only Cochrane and Wheatley, but between Cochrane, Wheatley, and Walden. Between the three, was it anything more than a transfer to Wheatley of the security which Cochrane previously held? I think, therefore, that the transaction of the 22d of September did not introduce any fresh element. I entirely agree with the Lord Justice that it is really immaterial whether the transaction of the 18th of July created

a legal or an equitable title in *Cochrane*; in either view registration was required.

Now with regard to the case of *Allsopp v. Day* (¹), without for a moment wishing to suggest that my own views at all differ from what was laid down by the learned judges in that case, I think that this is to be observed—the case was a very special one; the receipt was simply given for a sum of money paid as the purchase-money for a certain property, which, not by virtue of the transaction then entered into, but by virtue of the provisions of a deed of settlement executed eight months previously, the trustees had an authority to buy. Therefore, there being authority to buy this furniture under the original deed of settlement, some eight months afterwards they buy it, and then a receipt is given simply for the purchase-money. No transaction was coupled with it such as was coupled with the receipt given in the present case. In *Thomson v. Barrett* (²) the transaction was certainly very distinct from that with which we are dealing here. There the property was sold out and out. There was, no doubt, a verbal collateral promise by the purchaser, “If you pay me what I have given for it, I will give the property back to you.” But there was no obligation on the person to whom that promise was made, that if the property was sold and it did not realize that amount, he would make up the difference. Not only was it a purchase made in that form, but there was an actual transfer of the possession of the barge to Thomson, his name was painted on it, and it was forthwith his. It appears to me that the order which the Lord Justice has suggested is the right one.

THESIGER, L.J.: The first question which we have to determine is this, whether the transaction of the 18th of July was within the Bills of Sale *Act. In other words, [89 whether the documents which evidenced that transaction were such as required registration under the act. I am of opinion that the transaction was within the act, and that those documents did require registration. It is important to observe what are really the facts of this case as compared with those of the cases which have been cited as being opposed to the conclusion at which we have arrived. In the present case there is no evidence of any agreement or arrangement between the parties apart from the documents upon which the question arises; but we have simply to look at the documents themselves, and to see whether or not they constitute a bill of sale within the meaning of the act.

(¹) 7 H. & N., 457.

(²) 1 L. T. (N.S.), 268.

Now, in the first place, if the matter stood simply upon what has been called the receipt, I should be disposed to think that that was an assurance of the property, a bill of sale requiring registration. No doubt it is in form a receipt; but, as was pointed out in *Evans v. Prothero* (*), a document which is in form a receipt may at the same time constitute an agreement, and if it were necessary to decide the case simply upon that ground, I should be of opinion in this case, as the court was in *Evans v. Prothero*, that this document, in form a receipt, was also an agreement and an assurance of the goods in question. But it is not absolutely necessary to decide that point here, because the receipt is not the only document. We have as a contemporaneous document, clearly forming part of the same transaction, the other document called the letting agreement; and I cannot conceive there being any reasonable doubt, when the two documents are read together, that the transaction was, as evidenced by the documents themselves, a sale subject to a condition or defeasance under which, upon payment of money, which is called rent, within a certain time, the person originally granting or assigning the goods would be entitled to redeem them. In other words, it was a conditional sale, or mortgage of the chattels which were the subject of the sale. Upon that point we have an authority in a case exactly similar, the decision being founded upon precisely similar documents to those which we have now before us—the decision, I mean, of Mr. Justice Lindley in *Cochrane v. Matthews* (*); and, without going further into the matter, 90] *I will only refer to the observations made by Mr. Justice Lindley in that case, and adopt them as part of my judgment.

But it is said on the other hand that there have been two or three cases decided which are contrary to the views expressed by Mr. Justice Lindley, and to the decision at which we are arriving. I do not think it necessary to decide or discuss whether or not those cases were properly decided, because in my view they are fairly distinguishable from the present case, looking at the facts to which I have already adverted. The first case is *Thomson v. Barrett* (*). There moneys had been advanced, two sums amounting to £75, and it was proposed that a further sum of money to the amount of £20 should be advanced, and a verbal agreement was come to to the effect that, upon the £20 being advanced, a certain barge should be sold by the borrower to the lender. But, at the same time, as part of that verbal agreement,

(*) 1 D. M. & G., 572.

(*) *Ante*, p. 526 n.

(*) 1 L. T., (N.S.), 268.

there was a letting of the barge by the purchaser to the vendor, and a power for him to re-purchase the barge, if he so thought proper. After that verbal arrangement had been come to, a part of the transaction was put into writing in the form of a receipt—not a receipt for the whole purchase-money and setting out the whole transaction between the parties—but merely a receipt for the £20, the balance of the purchase-money; and, when the case came to be tried, the jury were distinctly asked to say whether that receipt was, as it purported to be, a mere receipt, or whether it was intended by the parties to be a record of the transaction in case the matter should be afterwards called in question. The jury found that it was a mere receipt, and Cockburn, C.J., in his judgment, comments upon that fact, and makes it a portion of the argument which leads him to the conclusion at which he arrives. Crompton, J., also says, “the jury having found that this document was not a record of the transaction, it does not require to be registered.” Therefore you have two circumstances distinguishing that case from the present, namely, first, that there was a verbal arrangement, a complete agreement, apart from the document in the form of a receipt, and which was found by the jury to be a mere receipt; and, secondly, that the whole of the transaction was not reduced to writing, but only a receipt for a portion of the purchase-money. The next case referred *to was *Allsopp v. Day* (*). There the circumstances [9] were these. There were trustees under a post-nuptial settlement. They had a power to lay out part of the trust funds in the purchase of furniture for the benefit of the wife and the husband. They, by the direction of the wife, who was a party to the settlement, arranged to purchase the husband's furniture, and the furniture was afterwards left in her possession and in the possession of her husband. The special case upon which the decision proceeded found as a fact that there was an arrangement for the purchase separate from the document, which was relied upon as not being within the Bills of Sale Act, that document being as in *Thomson v. Barrett* (*), in the form of a receipt. Therefore, here again we have that same distinction to which I have referred, namely, an agreement—a verbal agreement—therefore not coming within the Bills of Sale Act—and then a receipt given, not as a record of the transaction, but, as it purported to be, a mere receipt of purchase-money paid under the arrangement between the parties. The third case is *Byerley v. Prevost* (*), and it partakes of the circum-

(*) 7 H. & N., 457.

(*) 1 L. T. (N.S.), 268.

(*) Law Rep., 6 C. P., 144.

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Ex parte Odell. In re Walden.

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stances of the other two. There was first a verbal arrangement for a purchase, then a verbal arrangement for the re-letting of the goods, and then there was a simple receipt for the purchase-money. As I have already observed, it is not absolutely necessary to say whether those cases were rightly decided; but I must add that, if on any future occasion circumstances should arise identical with those in *Allsopp v. Day*, *Byerley v. Prevost*, and *Thomson v. Barrett*—at all events the first two—I think it would be very desirable that those cases should receive further discussion and consideration.

Now, that being the position as regards the original transaction of the 18th of July, we have to consider what is the effect of the transaction of the 22d of September. It seems to me that that transaction must have been one of two things—either it was a simple transfer by Cochrane to Wheatley of his rights, or it was an entirely new transaction. If it was a simple transfer by Cochrane, then, if our view of the original transaction is correct, inasmuch as Cochrane never took [92] apparent possession of the goods, *he could convey no greater right than he himself had. He would have had no right as against the trustee if the bankruptcy had then occurred, because the apparent possession was left in the hands of Walden, and consequently Wheatley's title would be liable to the same objection. On the other hand, if it were a new transaction, what was the purport of it? Surely nothing more than a repetition of the original transaction of the 18th of July. Practically it amounted to this—that Walden had still a title, equitable or otherwise, to the goods. The arrangement between the parties seems to have been this, that Cochrane should give up his rights on the payment of £120, and that a new arrangement, to which both Wheatley and Walden were parties, should be entered into, that arrangement being identical in its terms and substance with the arrangement of the 18th of July, namely, an arrangement by which the goods should become the property of Wheatley, but subject to a condition of redemption on the terms contained in the contemporaneous document. There again the whole transaction is shown by the two documents. The two documents constitute one assurance; and, just as the original assurance of the 18th of July required registration, so in my opinion—assuming that it was a new transaction and not a mere transfer by Cochrane—the assurance of the 22d of September required registration.

Solicitors for trustee: *Yarde & Loader*.

Solicitors for respondent: *Dillon-Webb, Kelly & Co.*

See *ante*, page 210.

A. agreed to sell B. a pair of horses, the title to remain in A. until payment. The horses remained in A.'s stable, but were controlled by B. Before any payment one horse died. B. took away both horses. Afterwards B. agreed to sell A. goods to apply on the purchase price. These sales amounted to a part of the purchase price only. At the agreed time of payment A. demanded the balance. B. refused to pay. A. retook the remaining horse. B. then brought this action for the goods sold :

Held, that his action would not lie, and that A. had a right to retake the horse: *Humeston v. Cheny*, 11 N. Y. Weekly Dig., 189.

A condition in a contract of sale of personal property that the title shall remain in the vendor until the purchase-money is paid, is valid, and will be enforced even against a *bona fide* purchaser, notwithstanding it is not acknowledged or proved and recorded, as required of certain instruments, by section 5, page 280, Wagn. St. That section does not apply to such contracts: *Wangler v. Franklin*, 70 Mo., 659.

A delivery of personal property, with the price charged to vendee on the books of the vendors, and with an

agreement in writing that, until paid for, the property should remain the property of the vendors, with right of removal on their part, is a present sale, and a *bona fide* purchaser for value without notice takes the title to the property as against first vendors: *Stadtfield v. Huntsman*, 15 Western Jur., 21.

A. sent goods to B. to be purchased by him, or sold on A.'s account, as B. should elect. In an action of replevin by A. against B. for the goods, A. put in evidence, tending to show admissions on the part of B., that he received the goods on consignment merely. Held, that B. was properly allowed to testify that when he received A.'s letter he decided to purchase the goods: *Yaeger v. Brown*, 128 Mass., 171.

Where the owner of a chattel, who has transferred the possession thereof to another person, with the agreement that it should become his property on the payment of a certain sum in weekly instalments, brings an action against a third person for a conversion of the chattel, after payment of some of the instalments and a failure to pay the remainder, the measure of damages is the whole value of the property, with interest from the time of the conversion: *Colcord v. McDonald*, 128 Mass., 470.

[10 Chancery Division, 93.]

C.A., Nov. 23, 1878.

**In re CURRIE (A person of unsound mind).* [93]

Lunacy—Vesting Order—Trustee Act, 1850, s. 5.

The sole surviving trustee of a sum of stock under a settlement having become of unsound mind, the persons beneficially entitled presented a petition in Lunacy for an order vesting in them the right to transfer the stock and receive the dividends :

Held, that such an order ought not to be made, as it would be administering the trust in Lunacy; but, on the petition being amended and intituled in the Chancery Division as well as in Lunacy, an order was made appointing the petitioners trustees of the settlement, and vesting in them, as such, the right to transfer the stock and receive the dividends.

UNDER a marriage settlement dated the 13th of July, 1827, a sum of £10,000 consols was vested in three trustees upon trust for Mr. Currie for life or until his bankruptcy, insolvency, or attempt to alien, and after the determination of that trust, upon trust for Mrs. Currie for life, and, subject to those interests, upon trusts for the children of the marriage, and if no child should acquire a vested interest,

then upon trust for Mr. Currie absolutely. Under the same settlement a sum of £2,860 New £3 per Cent. Annuities was vested in the same trustees upon the same trusts, except that the ultimate trust was for Mrs. Currie. There never was any issue of the marriage. Mr. Currie died in 1873, leaving a will by which he appointed Mrs. Currie, E. H. Currie, and F. L. Soames his executors, and bequeathed his residuary personal estate to Mrs. Currie absolutely.

The surviving trustee of the settlement was of unsound mind, not so found by inquisition.

This petition was presented in Lunacy by Mrs. Currie, E. H. Currie, and F. L. Soames, asking that the right to transfer the £2,860 New £3 per Cent. Annuities and to receive the dividends due or to accrue due thereon might vest in Mrs. Currie for her own benefit, and that the right to transfer the £10,000 consols and to receive the dividends due or to accrue due thereon might vest in the three petitioners as the legal personal representatives of Mr. Currie.

94] **Ingle Joyce*, for the petitioners, referred to the Trustee Act, 1850, s. 5, *Ex parte Bradshaw* (1), and *In re White* (2).

JAMES, L.J.: You are asking us to administer a trust in Lunacy, which it is our settled rule never to do. We therefore cannot make the order asked. But as affidavits have been made showing that the petitioners are proper persons to be appointed new trustees, we can make an order appointing them new trustees of the settlement, and vesting the right to transfer the funds in them as such trustees upon the petition being amended for that purpose and intituled in the Chancery Division as well as in Lunacy.

BAGGALLAY and THESIGER, L.JJ., concurred.

Solicitor: *F. L. Soames*.

(1) 2 D. M. & G., 900.

(2) Law Rep., 5 Ch., 698.

See *ante*, Gardner's Trusts, p. 476, and note, p. 477.

[10 Chancery Division, 94.]

C.J.B., July 29: C.A., Dec. 5, 1878.

Ex parte MUSGRAVE. In re WOOD.

Court of Bankruptcy—Jurisdiction—Money Demand by Trustee against Stranger to Bankruptcy—Mutual Accounts—Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), s. 72.

A liquidating debtor had consigned goods to commission merchants for sale, and they had made advances to him. They alleged that a balance was due to them from his estate, and the trustee in the liquidation alleged that a balance was due from them to the estate. They had not, however, tendered any proof or made any formal claim against the estate:

Held, by the Chief Judge and by the Court of Appeal, that, inasmuch as, if the trustee was right, there was a mere money demand by him against a stranger to the liquidation, the Court of Bankruptcy ought not, on the application of the trustee, to order accounts to be taken of the dealings between the debtor and the commission merchants; but that the trustee ought to proceed by action in the high court.

Ex parte Dickin (1) followed.

On the 21st of February, 1878, W. H. Wood, a stuff merchant at Bradford, filed a liquidation petition in the Bradford County *Court. The creditors resolved upon [95 a liquidation by arrangement, and appointed Benjamin Musgrave trustee. The debtor had had various business transactions with Messrs. Schumann Brothers, commission merchants at Leeds, borrowing money from them upon goods which he consigned to them for sale. They alleged that upon the taking of an account of these transactions a balance would be found due from the debtor's estate to them. The trustee, on the other hand, alleged that a balance was due from them to the debtor's estate. On the 30th of April, 1878, the trustee gave notice of an application to the court that an account might be taken of what was due or might become due from the debtor's estate to Schumann Brothers, in respect of moneys advanced by them to or on account of the debtor, and in respect of bills accepted or indorsed or handed over by them for or to the debtor; that an account might be taken of all moneys received or which might have been received by the firm of Schumann Brothers, or by either partner therein, in respect of goods of the debtor which had come into the hands of the firm or of either partner therein; and that the firm might be ordered to pay to the trustee the balance found due from them. Schumann Brothers had not tendered any proof or made any formal claim against the debtor's estate. On the 7th of May the judge (Mr. Daniel, Q.C.) made an order directing the accounts asked for to be taken, and adjourned the further

(1) 8 Ch. D., 377; 25 Eng. R., 360.

hearing of the motion until the taking of the accounts should have been completed. The taking of the accounts was proceeded with subsequently on several occasions before the judge himself, and evidence was gone into at considerable length. No objection had been raised to the jurisdiction. On the 18th of June the matter came again before the court. Meanwhile the judge had seen a report of the decision of the Court of appeal in *Ex parte Dickin* (¹). He was of opinion that the result of that decision was that he had no jurisdiction to make the order of the 7th of May, and he accordingly made an order that "the court being of opinion that the account directed by the order of the 7th of May when taken would, as against the respondents, according to the claim of the trustee, resolve itself into a mere money demand enforceable in the High 96] Court of Justice, and having regard *to the judgment of the Court of Appeal in *Ex parte Dickin* (¹), the court doth declare that it does not consider itself empowered to exercise jurisdiction in the matter of this application, and therefore discharges the order of the 7th of May last, and refuses the original motion without costs." The trustee appealed to the Chief Judge. The appeal was heard on the 29th of July, 1878.

De Gex, Q.C., and *Phear*, for the appellant: *Ex parte Dickin* does not apply. This is not a simple case, as it was there, of a money demand by the trustee against a stranger to the bankruptcy. The respondents allege that a balance is due to them, and for that they would be entitled to prove against the estate. If they should carry in a proof these accounts would have to be taken in the Court of Bankruptcy. In such a case sect. 72 gives the Court of Bankruptcy jurisdiction to take the accounts on the application of the trustee. *Ex parte Anderson* (²), *Ex parte Cohen* (³), and *Ex parte Ditton* (⁴), show how fully the jurisdiction has been recognized by the Court of Appeal. *Ex parte Dickin* was nothing more than a decision that, under the particular circumstances of that case, it was not expedient to exercise the jurisdiction. In the present case complete justice can only be done in the Court of Bankruptcy. Moreover, the respondents have in effect submitted to the jurisdiction. They did not raise the objection; it was taken by the judge *mero motu*.

Northmore Lawrence, for the respondents, was not heard.

(¹) 8 Ch. D., 377; 25 Eng. R., 360.

(²) Law Rep., 7 Ch., 20.

(³) Law Rep., 5 Ch., 473.

(⁴) 1 Ch. D., 557.

BACON, C.J.: The decision of the Court of Appeal in *Ex parte Dickin* has, no doubt, caused some surprise. Sect. 72 has been acted upon for some years, and it was thought that it was the intention of the Legislature to give the Court of Bankruptcy a power which it did not before possess, of dealing with such a subject as this, and no doubt *Ex parte Anderson* and other cases which have been referred to were decided on that footing. But Mr. De Gex did *not [97 refer to one very important exception, the case of *Ellis v. Silber* (*), in which a different view was taken of the jurisdiction. The decision of the Court of Appeal in *Ex parte Dickin* (*) is perfectly plain and distinct, without any possibility of doubt. In that case, no doubt, a question was raised with regard to *Ex parte Waring* (*) and it was also suggested that there had been misconduct on the part of factors in not keeping their principals' property separate from their own, and no such questions arise in the present case. In the present case there is simply a question between two commercial firms, who occupied the position of debtor and creditor. In the result of their dealings there must be a balance one way or the other; in other words, a debt on the one side or the other. The case, therefore, comes most distinctly within the decision in *Ex parte Dickin*, which was, as the Master of the Rolls expressed it, that (*) "whenever there is a simple money demand by the trustee of a bankrupt's property, which is capable of being tried by the ordinary tribunals, I can see no reason why the Court of Bankruptcy should assume jurisdiction to try it." To my mind, no words can express more distinctly the opinion of his Lordship that the Court of Bankruptcy has no jurisdiction to try the simple question whether A. shall pay to B. or B. to A. a certain balance. Nor can I find any difference in the judgments of the two other judges. The first part of the judgment of Lord Justice James referred to the case of *Ex parte Waring*, and the rest to the interpretation which he gave to the words in sect. 72, "which the court may think it expedient or necessary to decide;" those words, he thought, being introduced because the Legislature thought they could trust the Court of Bankruptcy not to exercise the jurisdiction unless it was really expedient to withdraw the case from the ordinary tribunals of the country. And he thought it was not expedient to do so in the case of a mere money demand. Neither *Ex parte Cohen* (*)

(*) Law Rep., 8 Ch., 88.

(*) 8 Ch. D., 387; 25 Eng. R., 360.

(*) 8 Ch. D., 377; 25 Eng. R., 360.

(*) Law Rep., 7 Ch., 20.

(*) 19 Ves., 345.

nor *Ex parte Ditton* (*) is in favor of the present appeal. What was the learned county court judge to do? In the first place, he took the view which has since been held to 98] be erroneous, and *conceived that it was in his power to try the question as if it was a suit in the Court of Chancery, in which the trustee was plaintiff and the respondents defendants; and he ordered an account to be taken, with the intention of afterwards making an order for payment of the balance to whomsoever it should be found due. When the account had been partly taken, and the matter came before him again, he found that the Court of Appeal had decided that, where there was a mere money demand by the trustee, the Court of Bankruptcy ought not to make an order for payment, and he thereupon very wisely stayed his hand and proceeded no further with the case. If any balance is due to the trustee, his proper remedy is to bring an action for it. The plain duty of every court is to adopt and obey the construction which has been put upon an act by the Court of Appeal; and, in my opinion, the learned judge was quite right in supposing that he had no jurisdiction to make such an order. If the decision in *Ex parte Dickin* (†) had been brought to his attention sooner, probably he would not have troubled himself to take the account, as it was not expedient that such a case should be investigated in the Court of Bankruptcy, but it ought to be tried in the High Court. I am unable to say that the learned judge was wrong. If I had been in his place I should have done the same thing. I dismiss the appeal, but I shall give no costs.

From this decision the trustee appealed. The appeal was heard on the 5th of December.

De Gez, Q.C., and *Phear*, for the appellant, repeated the arguments which they had addressed to the Chief Judge, and referred to the same cases, and also to *Ex parte Warren* (*).

Northmore Lawrence, for the respondents, was not heard.

JAMES, L.J.: I think that this case is incapable of being distinguished from *Ex parte Dickin*. There is a simple money demand by the trustee on behalf of the debtor's 99] estate, and the principal of that *decision is, that a man who is merely said to be a debtor to the estate of a bankrupt cannot be brought compulsorily into the Court of Bankruptcy. It was not intended that the Court of Bankruptcy should try every bill of a tradesman who happens

(*) 1 Ch. D., 557.

(†) Law Rep., 10 Ch., 222; 12 Eng.

(*) 8 Ch. D., 377; 25 Eng. R., 360.

R., 714.

to be a bankrupt. The case is really the same as *Ex parte Dickin* ('), which is a decision of this court, and is binding upon us.

BAGGALLAY, L.J., concurred.

THESIGER, L.J.: It seems to me that our decision in the present case is a direct consequence from that in *Ex parte Dickin*. Here the trustee himself started the proceedings for the express purpose of showing that he had a money demand against the respondents. If a trustee in bankruptcy cannot enforce a money demand in the Court of Bankruptcy, it seems to me to follow that he cannot institute a proceeding to have an account taken which he says will result in showing that he has such a demand.

Appeal dismissed with costs.

Solicitors for trustee: *W. & J. Flower & Nussey*, agents for Wood, Killick & Hutton, Bradford.

Solicitors for respondents: *Torr & Co.*, agents for B. C. Pullan, Leeds.

(¹) 8 Ch. D., 377; 25 Eng. R., 360.

[10 Chancery Division, 100.]

C.J.B., July 29: C.A., Dec. 5, 12, 1878.

**Ex parte BROOK. In re ROBERTS.* [100

Leasehold Interest of Bankrupt—Disclaimer by Trustee—Previous Severance of Tenant's Fixtures—Rights of Landlord—Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), ss 23, 125..

The effect of a disclaimer by the trustee in a liquidation of a lease vested in the debtor is to place the trustee in the position of never having had any estate in the leasehold property.

Consequently, any severance by the trustee of the fixtures attached to the property after the date at which the term is put an end to by the disclaimer, i.e., the date of the trustee's appointment, is necessarily a wrongful act, and gives the landlord a right to recover the value of the fixtures from the trustee.

Decision of Bacon, C.J., reversed.

Whether, after severing the fixtures, the trustee has any right to disclaim the lease, *quære*.

But at any rate he cannot as against the landlord assert the invalidity of his own disclaimer.

ON the 10th of June, 1874, an agreement in writing was entered into between James Brook & Sons and James Roberts, a card maker, by which they agreed to let and he agreed to take a room in their premises called Providence Mill, in Southgate, Elland, as their tenant for one year from the date thereof, and so on from year to year until the tenancy should be determined on either side by a six months' notice to quit. The rent was to be £40 per annum. The lessors were to supply steam power to the room, to enable the lessee

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to run a steam engine turning the card setting machines attached thereto from 6 A.M. to 9 P.M. daily. And it was agreed that Roberts, his executors, administrators, and assigns, should and would, from time to time during the period that he or they should continue to occupy the room under the agreement, keep repaired at his or their own expense all the windows, doors, locks, fastenings, and all other fixtures in, upon, or belonging to the room, and leave the same in as good repair and condition as they were then in, reasonable wear and tear and accidents by fire only excepted. Roberts entered into possession under this agreement, and continued tenant of the room until the 24th of January, 1878, when he filed a liquidation petition in the 101] Halifax County Court. *The same day Frederick Foster was appointed receiver of the debtor's property and manager of his business, and he carried on the business until the first meeting of the creditors on the 11th of February, 1878, when a liquidation by arrangement was resolved upon, and Foster was appointed trustee. Foster continued to carry on the business up to the 19th of February, 1878, up to which time Brook & Sons continued to supply steam power under their agreement. The debtor had erected various trade fixtures in the room, and on the 9th of March, 1878, the trustee advertised these fixtures for sale by auction on the 13th of March. On the 11th of March Brook & Sons served a notice in writing on the trustee, requiring him to decide within twenty-eight days whether he would disclaim the demised premises or not. On the 13th of March the fixtures were sold by auction. Brook & Sons attended at the sale and bought some of the property. The proceeds of the sale were afterwards received by the trustee, and the fixtures, with the exception of those which Brook & Sons had bought, were severed and removed by the respective purchasers. On the 27th of March, 1878, the trustee executed a written disclaimer of the demised premises, and sent it to Brook & Sons, with the key of the premises. The trustee had not previously obtained the leave of the court to disclaim, in accordance with rule 28 of the Bankruptcy Rules, 1871, but Brook & Sons accepted the disclaimer and the key. On the 18th of June they applied to the court for an order that the trustee should pay over to them the proceeds of the sale of the fixtures, and the judge ordered this to be done. His honor was of opinion that the case was governed by the decision of the Court of Appeal in *Ex parte Stephens* (1), and that, as the disclaimer, when

(1) 7 Ch. D., 127; 23 Eng. R., 458.

executed, determined the lease as from the date of the trustee's appointment, the fixtures became the property of the lessors, and the trustee had no right to remove them. The trustee appealed to the Chief Judge.

The appeal was heard on the 29th of July, 1878.

Winslow, Q.C., and *Beaumont*, for the appellant: *Ex parte Stephens* does not apply to the present case. There the trustee severed the fixtures after he had executed a disclaimer. *In the present case the severance was [102 before the execution of the disclaimer. No doubt the disclaimer, when executed, operates as a surrender of the lease at the date of the appointment of the trustee, but the period between that date and the execution of the disclaimer is an "excrescence" on the term during which the trustee had still a right to consider himself in possession as tenant: *Minshall v. Lloyd* ('); *Mackintosh v. Trotter* ('); *Weeton v. Woodcock* (').

The disclaimer does not invalidate what the trustee has rightly done while he was in possession. If the decision is right, a trustee could never execute a disclaimer of leasehold property in which there was valuable machinery, for he would be simply making a present of it to the landlord.

[They were stopped by the court.]

Finlay Knight, for the landlord: The principle of *Ex parte Stephens* (') applies, and it concludes this case. The surrender operates as a surrender of every interest which the tenant takes under the lease. The right to remove fixtures is connected with the term, and must be exercised during its continuance or within a reasonable time afterwards. The words of the act are plain. The trustee need not sever the fixtures until he has made up his mind about disclaiming.

- BACON, C.J.: There never has been—at least of late years—any doubt about the law on this subject; it was settled, I think, even before the case of *Minshall v. Lloyd* ('). As between lessor and lessee, the latter has a certain time after the expiration of his term within which he may remove the fixtures. It has been held that it must be a reasonable time, and what is a reasonable time must be decided with reference to the circumstances of each particular case. In this case, before there was any talk about a disclaimer, the trustee exercised his clear legal right of advertising the fixtures

(') 2 M. & W., 450.

(') 3 M. & W., 184.

(') 7 M. & W., 14.

(') 7 Ch. D., 127; 28 Eng. Rep., 458.

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for sale. Two days afterwards the landlord gave him notice to decide within *twenty-eight days whether he would disclaim the lease or not. Within that period of twenty-eight days, if he did not previously disclaim, the trustee had a perfect right to sever the fixtures. Till the end of that time, or until a prior disclaimer, it could not be said whether there would be any determination of the lease. Within the twenty-eight days the trustee exercised his right of selling the fixtures, and afterwards he complied with the request of the landlord and executed a disclaimer of the lease. He sent the key of the premises to the landlord, and the landlord accepted it. What has *Ex parte Stephens* (*) to do with a case like this? There the severance of the fixtures was an unlawful act, for the disclaimer had been previously executed. Here the lease had not come to an end till the disclaimer had been executed, though when it was executed it related back to an earlier period. The notice to disclaim within twenty-eight days operated as a license by the lessor to the trustee to retain possession of the premises for that period, and of course it carried with it a right to exercise all the rights of a lessee. The trustee had a right to sell the fixtures within the twenty-eight days, unless he disclaimed before, and he cannot afterwards undo what he has done. It would be an utter perversion of the language of the statute to hold that, because the disclaimer, when executed, relates back by operation of law to the time of the appointment of the trustee, everything done between its execution and the appointment of the trustee is to be overhauled. The order of the county court must be discharged, with costs.

From this decision Brook & Sons appealed. The appeal was heard on the 5th of December, 1878.

De Gex, Q.C., and *Finlay Knight*, for the appellants: The *ratio decidendi* of *Ex parte Stephens* exactly applies to this case. The trustee was not, during the period between his own appointment and the execution of the disclaimer, in possession of the property, "under a right still to consider himself as tenant," within the meaning of *Weeton v. Woodcock* (*). That period cannot be called an "excrescence" [104] on the term, to use the *language of Parke, B., in *Mackintosh v. Trotter* (*). By virtue of sects. 23 and 125 of the act, the effect of the disclaimer is the same as if an

(*) 7 Ch. D., 127; 23 Eng. Rep., 458.

(*) 3 M. & W., 184.

(*) 7 M. & W., 14.

actual surrender of the lease had been executed at the date of the trustee's appointment. Here the fixtures were removed a month after the appointment of the trustee; that cannot even be called a reasonable time. The right to remove fixtures is the right of a tenant; when the trustee declines to be tenant he loses that right. He remained in possession of the property for the purpose of making up his mind whether he would be tenant or not.

[JAMES, L.J.: I should be glad to see in the act a provision that, if the trustee chose to remove the fixtures in this way, he should be estopped from afterwards disclaiming.]

In *Saint v. Pilley* (¹) Amphlett, B., intimated an opinion that the trustee in a liquidation, after selling the fixtures, could not disclaim the lease. But that was only a *dictum*; the case only decides that a trustee who sells fixtures cannot, by a subsequent surrender of the lease, defeat the title of the purchaser. In the present case the question is as to the trustee's own right, and if the term is gone there can be no rights springing out of it.

[They were stopped by the court.]

Winslow, Q.C., and *Beaumont*, for the trustee: The consequences of allowing this appeal would be very serious. The object of sect. 23 was to enable the trustee to get rid of a burdensome lease; if the appellants are right, he cannot do this without in many cases sacrificing very valuable machinery. *Ex parte Stephens* (²) does not apply, for there the disclaimer had been executed before the trustee removed the fixtures. A trustee may, by virtue of sect. 23, disclaim at any time, even if he has paid rent for the property, which would make him tenant under the lease.

[JAMES, L.J.: Suppose an action is brought against him by the landlord, and he disclaims afterwards?]

The disclaimer could not affect a vested right of action for *breach of covenant: *Saint v. Pilley* (¹). The lease [105 is vested in the trustee until he disclaims.

[JAMES, L.J.: I think it is *in græmio legis*.]

It is part of the bankrupt's property which vests in the trustee on his appointment, and vests in him as from the date of the act of bankruptcy to which the adjudication relates back: sect. 11. For the period between the act of bankruptcy and the adjudication or the appointment of the trustee the lease must be vested in the trustee. The trustee is liable to pay rent until he disclaims. The tenant's right to remove fixtures is illustrated by *Minshall*

(¹) Law Rep., 10 Ex., 187; 12 Eng. R., 577. (²) 7 Ch. D., 127; 28 Eng. R., 458.

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v. *Lloyd* ('); *Mackintosh v. Trotter* ('); *Weeton v. Woodcock* (').

[JAMES, L.J.: Is there any decided case applying to a voluntary surrender by the tenant?]

No. Under the Bankruptcy Act of 1849 a lease of the bankrupt did not vest in the assignee until he had done some act to accept it; after he had done such an act he could only get rid of his liability by assigning the lease to a pauper. Under the present Bankruptcy Act the lease vests in the trustee on his appointment, without any act of his own; and he is in the same position as if under the old law he had accepted the lease, that is, he takes it as an assign. If by his subsequent disclaimer the term is gone for all purposes as from the date of his appointment, he could sue the landlord for rent which he had himself paid. If there had been an actual voluntary surrender, and the landlord had afterwards allowed the tenant to remain in possession, surely he would have had a right to remove the fixtures. The fixtures were by relation the property of the trustee up to the date of his own appointment, and after that he is entitled to a reasonable time within which to remove them. A month is not an unreasonable time: *Slansfeld v. Mayor, &c., of Portsmouth* ('). For some purpose or other the trustee had a right to remain in possession till he disclaimed.

[BAGGALLAY, L.J.: Does not a surrender deprive the landlord of his right to accruing rent?]

If so, sect. 24 gives him a right to prove for damages in 106] the *bankruptcy. The disclaimer cannot, however, relieve the trustee from liability in respect of rent accrued due down to the date of the disclaimer. It does not divest a vested right of action: *Smyth v. North* (').

[THESIGER, L.J.: That case only decided that the original lessee remained liable on his covenant.]

But Bramwell, B., says ('), "The words are, no doubt, that the lease is to be deemed to have been surrendered from the date of the order of adjudication; but this must, perhaps, be taken to mean, so as not to give rise to any fresh rights or liabilities as between the landlord and the bankrupt, not for all purposes."

[THESIGER, L.J.: Martin, B., said (') that sect. 23 did not apply to the case at all.]

In the present case the trustee tendered the rent due up

(') 2 M. & W., 450.

(') 3 M. & W., 184.

(') 7 M. & W., 14.

(') 4 C. B. (N.S.), 120.

(') Law Rep., 7 Ex., 242.

(') Ibid, 246.

(') Ibid, 244.

to the time of the disclaimer. A voluntary surrender of a lease does not affect the rights of a third party, e.g., an equitable mortgagee of the lessee, *Saint v. Pilley* ⁽¹⁾; therefore the lease remains in existence for some purposes. *Penton v. Robart* ⁽²⁾ shows that a tenant who is in possession after the expiration of his lease may remove trade fixtures. Such fixtures are really chattels, and are not affected by a surrender: *Parsons v. Hind* ⁽³⁾.

[THESIGER, L.J.: If so, they ought not to be called fixtures. But it was admitted in the county court that the articles in dispute were tenant's fixtures.]

When the trustee removed the fixtures he was acting lawfully.

[JAMES, L.J.: It was his own subsequent act which made the removal unlawful.]

The disclaimer cannot override what had been previously lawfully done. And in this case the landlords were consenting parties, for they bought part of the fixtures at the sale without raising any objection. At any rate, they cannot recover the money which they themselves paid. The rightful nature of the act must be determined once for all at the time when it is done.

**De Gex*, in reply: Sect. 23 says that the court may [107 order possession of the disclaimed property to be delivered up. By removing the fixtures the trustee has put it out of his power to deliver up the disclaimed property, i.e., the lease and all belonging to it; and it is right, therefore, that he should pay the value of what he has removed. It is said that a tenancy is to be implied between the date of the trustee's appointment and the disclaimer, but there was no new contract between the landlord and the trustee.

[THESIGER, L.J.: In *Saint v. Pilley* ⁽¹⁾ it was held that the purchaser of fixtures from the trustee was entitled to them as against the landlord.]

There there was an actual surrender by the trustee. He had previously sold his right to disannex the fixtures, and he could not convey to the landlord more than he himself had. The landlord could not call on the trustee to pay rent for the period between his appointment and the disclaimer: *Ex parte Dressler* ⁽²⁾. The trustee was in possession of the property solely for the purpose of exercising his judgment whether he would disclaim or not: *Ex parte Stephens* ⁽³⁾. Sect. 35 gives the landlord a right to prove for the rent due

⁽¹⁾ Law Rep., 10 Ex., 187; 12 Eng. ⁽²⁾ 9 Ch. D., 252; 26 Eng. R., 84. R., 577.

⁽³⁾ 2 East, 88.

458.

⁽³⁾ 14 W. R., 860.

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up to the date of the adjudication ; that tends to show that the trustee never became tenant. The words of sect. 23 are clear. *Weeton v. Woodcock* (*) shows that what has been called an "excrecence" on the term only arises when the term has not been put an end to by the tenant's own act.

[JAMES, L.J.: The word "excrecence" *ex vi termini* means something growing out of the original term, such as a tenancy at will after its expiration.]

Smyth v. North (†) has no application ; the question there was, whether sect. 23 applied to strangers to the bankruptcy.

Winslow, in reply : The decision in *Ex parte Dressler* was founded on this, that the trustee had not disclaimed [108] the lease, but had surrendered it. If *he had disclaimed, he could not then recover from the landlord rent which he had paid him. But that must be the result, if the effect of a disclaimer is to put an end to the lease for all purposes.

Dec. 12. The judgment of the Court (James, Baggallay, and Thesiger, L.JJ.) was delivered by

THESIGER, L.J., who, after stating the facts, continued : The question in dispute turns upon the effect to be given to sect. 23 of the Bankruptcy Act, 1869. In the recent case of *Ex parte Stephens* (*), before this court, the effect of the disclaimer of a lease, in respect of tenant's fixtures severed by the trustee subsequently to the disclaimer, was considered, and it was decided that the landlord was entitled to them as against the trustee. The Chief Judge has held that the circumstance in the present case of the severance having occurred before disclaimer constitutes such a distinction between it and *Ex parte Stephens* as to render the latter no authority upon the point now to be decided. We, however, are of opinion that the *ratio decidendi* in that case is wide enough to govern the decision of the present. The premiss upon which our judgment was founded was, that where the trustee in a liquidation disclaims, there, by the joint operation of the disclaimer and the provisions of sects. 23 and 125 of the act, the term is to be deemed for all purposes to have come to an end on the day of the appointment of the trustee. In other words, the trustee is placed in the position of never having had any estate at all. But, from this premiss, the logical and legal conclusion is, not merely that a severance by the trustee of fixtures after the disclaimer is wrongful, although that is included, and was all that was

(*) 7 M. & W., 14.

(†) Law Rep., 7 Ex., 242.

(§) 7 Ch. D., 127 ; 23 Eng. R., 458.

necessary to be decided in *Ex parte Stephens*, but that any severance which has taken place after the date when the term is put an end to for all purposes, and by a person who, like a trustee, is in the position of never having had any interest in the term, must necessarily be wrongful.

Apart, however, from the authority of *Ex parte Stephens*, we arrive at the conclusion that the landlords' claim in the present case is a well-founded one. The general [109 presumption of law with reference to tenants' fixtures remaining affixed to the freehold when a term comes to an end is, that "they become a gift in law to him in reversion," and are, therefore, not removable (per Lord Holt in *Poole's Case* (')). That general presumption has, however, been made subject to a qualification which is expressed in the proposition laid down by the Court of Exchequer in *Weeton v. Woodcock* (') in these terms—viz., "that the tenant's right to remove fixtures continues during his original term, and during such further period of possession by him as he holds the premises under a right still to consider himself as tenant," or, in the language of Baron Parke in *Mackintosh v. Trotter* ('), "that the tenant has the right to remove fixtures of this nature during his term, or during what may for this purpose be considered as an excrescence on the term." Much reliance has been placed in argument on the part of the respondent upon this qualification of the general presumption of law, and it has been urged upon us that in this case the period between the appointment of the trustee and the disclaimer was such an "excrescence" on the term, and that the respondent had during that period a right to consider himself as tenant. We cannot accede to that argument. It is not easy to define precisely what was meant by the propositions to which we have just referred, and we observe, that as regards the rule laid down in *Weeton v. Woodcock*, the difficulty which we feel in understanding its exact meaning was shared in by the Court of Common Pleas, as stated by Mr. Justice Willes in delivering the judgment of that court in *Leader v. Homewood* ('). It may be that in cases where a tenant holds over after the expiration of a term certain under a reasonable supposition of consent on the part of his landlord, or in the case where an interest of uncertain duration comes suddenly to an end, and the tenant keeps possession for such reasonable time only as would enable him to sever his fixtures and to remove them with his

(') 1 Salk., 368.

(2) 7 M. & W., 14, 19.

(3) 3 M. & W., 184.

(4) 5 C. B (N.S.), 346, 553.

goods and chattels off the demised premises, or even in cases where the landlord exercises a right of forfeiture, and the tenant remains on the premises for such reasonable time [110] as last referred *to, the law would presume a right to remove tenant's fixtures after the expiration or determination of the tenancy. But, however that may be, we are clearly of opinion that the case of a surrender of a lease by a tenant, while tenant's fixtures remain affixed to the freehold, does not, either upon principle or the authority of decided cases, give any right to the tenant subsequently to remove such fixtures. At the date of the surrender they form part of the freehold, and the law has no right to limit the effect of the surrender by excluding from it that which legally passes by it, and which has not been excluded from it by the bargain of the parties. If that be so, then when the Legislature, by sect. 23 of the Bankruptcy Act, 1869, says that a lease disclaimed shall be deemed to be surrendered, are we justified in attributing to the language used any meaning other than that which is its natural meaning—viz., that the ordinary consequences of a surrender shall follow the disclaimer? No doubt difficulties will always arise when courts are called upon to treat a thing as being in law that which in fact it is not: and if in this case the strict carrying out in all points of the analogy of an ordinary surrender were to lead to consequences manifestly absurd or unjust, it would be the duty of the court to find, if possible, some construction of the section in question which would not entail such consequences. In the present instance no such consequences are the result of the construction which the language of the section naturally requires. Extreme cases may, it is true, be put in which it would work a hardship upon the creditors, and the present case is, perhaps, an example; for, if the trustee had kept the property on for a year, he might, at the expense of the small payment of £40, have obtained the fixtures in dispute. But in a vastly greater number of cases any different construction would work a considerable hardship upon the landlord. Indeed, in *Saint v. Pilley* (*), Baron Amplett appears to have considered the dismantling of a house by severance of tenant's fixtures inconsistent with the exercise of the right of disclaimer, and to have been disposed, as stated by him (*), to agree with the view taken in *Amos on Fixtures* (*), that after the sale of fixtures a trustee could

(*) Law Rep., 10 Ex., 137; 12 Eng. R., 577. (*) Law Rep., 10 Ex., 141; 12 Eng. R., 580.

(*) 2d ed., p. 239.

*not disclaim. When, too, it is remembered that the [111 section under consideration is one which, upon any construction of it, favors the interests of the creditors at the expense of the landlord, we think that it would be unreasonable to allow possible cases of hardship upon the creditors to weigh against an interpretation of it which gives to the analogy of a surrender its natural and proper effect. A suggestion was made in argument, although not much pressed, that even though the appellants may be entitled to recover the proceeds of fixtures sold to third parties, they cannot recover moneys paid by themselves under no mistake of fact. But we think that a distinction ought not to be made between those moneys and the remainder of the moneys arising from the sale. At the time when the sale took place no disclaimer had been made; the trustee was acting, apparently, within the scope of his powers; and the landlords could do no more than give him notice that he was required to exercise his election as to whether he would disclaim or not; and, looking to the fact that the time limited by the 24th section of the Bankruptcy Act, 1869 (twenty-eight days), for the exercise of his election had not expired when the sale took place, it would be contrary to justice to hold that the landlords, under such circumstances, endeavoring to prevent the complete dismantling of their property, and having no other means of doing so than by themselves purchasing and paying for the fixtures, are, when, by the subsequent conduct of the trustee, the fixtures purchased by them turn out to be their own, precluded from recovering the money which they had paid for them. Whether a sale of fixtures by a trustee has or has not in ordinary cases the effect attributed to it by Baron Amplett, it is unnecessary in this case to decide, for we are of opinion that it does not lie in the mouth of the trustee, as between him and the appellants, to assert the invalidity of the disclaimer. The effect, therefore, of a disclaimer generally being such as we have laid down, and there being in the agreement between the debtor and his landlords no special stipulations as regards fixtures which make this case in any way exceptional, the necessary conclusion must be that the respondent, by disclaiming the property to which the fixtures were attached after his sale of those fixtures, constituted himself by relation a wrongdoer in respect of that sale, and *is liable [112 to pay over to the appellants the whole of the moneys which by his wrongful act he has realized. The appeal must be allowed, the judgment of the Chief Judge reversed, and the

order of the county court judge restored, with costs here and in the court below.

Solicitors for appellants: *Williamson, Hill & Co.*, agents for Foster & England, Halifax.

Solicitors for trustee: *Learoyd, Learoyd & Peace*, agents for J. W. Longbottom, Halifax.

As to when an assignee, receiver, etc., becomes liable for the rent of premises leased to the assignor, debtor, etc., see *ante*, p. 90, note.

This case is hardly in harmony with the cases which hold that a tenant may remove fixtures placed upon demised premises (12 Eng. Rep., 582 note; 28 Eng. Rep., 462 note); though, as is shown, there is considerable contrariety in the cases.

If fixtures, which a lessee has a right to remove while in possession of the premises, are left until after such possession is surrendered, without agreement reserving to the lessee the right of removal, the lessor takes title to them as part of the realty. The fact that lessees, before surrendering the possession, asked the lessor if they might leave the fixtures in the room rented, which was a store, and that the lessor replied that he was willing they should be left, as they might help him to rent the store, cannot be held by the court to imply a license to the lessees to re-enter and remove such fixtures: *Josslyn v. McCabe*, 46 Wisc., 591, 18 Am. Law Reg. (N.S.), 711, 713 note.

A mortgage was given in January, 1872. In November, 1873, the defendant, a son of the mortgagor, moved a frame building upon the premises, where he placed it on a stone foundation which he built, and afterwards used as a shop and dwelling. The premises were sold under foreclosure in December, 1877, and bought by the mortgagees, whereupon the defendant agreed to pay rent for the house and lot, and did so from January to December, 1878. In January, 1879, proceedings were begun to remove him for non-payment of rent, and he then claimed that the building belonged to him, and asserted his right to remove it as a trade fixture. He was restrained from doing so by injunction. Held, without determining the question

whether such a building is, as between mortgagor and mortgagee, a trade fixture, that the defendant, by leasing such building after the foreclosure sale and paying rent therefor, is estopped from setting up title thereto in himself: *Betts v. Wurth*, 32 N. J. Eq., 82.

A., while in possession of land belonging to B., who had agreed to give him a deed upon certain terms, erected a building thereon under an agreement that it was not to be the property of B., but that A. should have the right to remove it at any time. Subsequently A., without the knowledge of B., sold the building by bill of sale, not recorded, to C. Afterwards B., at the request of A., conveyed the land to D. by a warranty deed, which made no mention of the building. At the same time B.'s agreement to convey to A. was given up, and A. gave B. a release of the land "with all the privileges and appurtenances thereto belonging." C. then brought an action against B., for the conversion of the building. Held, that as against B. the title to the building passed by the sale to C.; and that the action could be maintained: *Dolliver v. Ela*, 128 Mass., 557.

A tenant's erections are not brought within a subsequent mortgage on the premises by the tenant's neglect to remove them on a renewal of his lease by a new landlord: *Kerr v. Kingsbury*, 39 Mich., 150.

Physical annexation to realty is not necessary to convert a chattel into a fixture. Whether it be such depends much on the business for which the premises are used. If the article, whether fast or loose, be indispensable in carrying on the specific business, it becomes a part of the realty: *Morris's Appeal*, 89 Penn. St. R., 368.

Where the purchaser of a factory gave a mortgage for a portion of the purchase-money upon the factory lot, "together with the buildings and im-

provements thereon, with all the machinery, engines, boilers, railroad tracks and fixtures, contained in, or appurtenant to the premises," the machinery was held to be fixtures, though a separate sum was on the sale paid therefor in contradistinction to the realty, and a bill of sale was given for the machinery: *Morris's Appeal*, 88 Penn. St. R., 368.

A mortgage included with the real estate the manufacturing establishment and buildings for the purpose to be erected thereon. The lessees of the factory, after putting in machinery, purchased the reversion of the land on which it stood, subject to the mortgage. Held, that they united the title to the realty and fixtures in one person, and the fixtures became subject to the mortgage: *Jones v. Detroit*, etc., 38 Mich., 92.

An engine and machinery used for manufacturing purposes, and described in a deed of trust as personal property, but so fixed that they cannot be removed without tearing down the walls of the building where they are placed, are fixtures, and pass as a part of the realty under the trust deed. The mere description of them in the deed as personal property does not make them so, nor estop the party from asserting their true character as fixtures: *Jenny v. Jackson*, 6 Bradwell (Illa.), 82.

Where one person enters on the land of another with an intention to hold an adverse possession as against the true owner, and erects a building thereon, to be occupied in connection with his adverse possession, he has no right to such building as against the rightful owner of the land, although the same is of wood resting on posts or blocks, and kept in place only by its own weight. Such building is not personal property, but is part of the realty: *Doscher v. Blackiston*, 7 Oregon, 143.

Where a party out of the state makes an unconditional sale of machinery to a resident, who affixes it to the soil but makes no payment, there is no lien enforceable in behalf of the vendor.

Whether a vendor's lien for machinery sold and attached to the soil would be enforceable, as against a prior mortgagee of the premises, *quere*.

Chattels may be converted into realty by the purchaser even though he has

not paid for them, if they were sold to him without conditions.

Machinery was set up in a building as follows: A boiler was erected in a brick arch, an engine fastened on timbers let into the ground and resting on a foundation of masonry, and a saw mill placed over the engine, connected with it by belts and chains, and fastened by bolts or screws to the framework of the building:

Held, that the mode and degree of annexation was enough to convert these chattels into realty.

After a mortgage had been assigned, the mortgagor bought machinery which he affixed to the soil, and went into partnership with his son, who was to have an equal interest with him. The machinery was not paid for, however, and after foreclosure of the premises was decreed, and also after the firm had dissolved, the mortgagor, acting in the firm name, released the firm's interest in the machinery to the vendor, whom he licensed to enter and remove it.

Held, that the assignee of the mortgage could insist that the machinery was reduced to realty subject to the mortgage, and unremovable as against his objection: *Coleman v. Stearns*, etc., 38 Mich., 30.

A saw mill and its appointments are *prima facie* part of the realty, and should be so treated if no agreement, understanding or intent is shown to change their character.

Machinery not made expressly for use in the building in which it is placed, but capable of beneficial use if removed or set up in some other building, is personalty, or realty according to the intent or understanding fairly deducible from the circumstances.

Where real estate is owned in undivided interests by the individuals who compose a partnership which has only the use of it, trade fixtures set up by the partners do not become realty, and when their occupation ceases, the partners may remove them. They are not covered by mortgages on the premises if their owners did not plainly mean them to be so.

Machinery bought as partnership property, and constituting part of its stock in business, is liable to the payment of partnership debts, and subject to the adjustment of balances as be-

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tween the partners; but if it is annexed by the partners to lands also held as partnership property it may become a part of the realty.

Where land and machinery put upon it are held by different titles, and a steam engine is afterwards put in to run the machinery, the engine partakes of the character of the machinery, and does not become part of the realty: *Robertson v. Corsett*, 39 Mich., 777.

Where one who has leased land to a firm buys out the right of one of the partners, and afterwards gives a mortgage on the premises, the possession of the new firm is notice to the mortgagee that erections put up by the former firm are not covered by the mortgage, because the other partner's rights cannot be taken away: *Kerr v. Kingsbury*, 39 Mich., 150.

A portable hot air furnace, resting by its own weight upon the ground, put into a house by a person rightfully in possession under an agreement for a deed, does not become part of the realty, although connected with the house by a cold air box and hot air pipes and registers in the usual manner.

Gas-fixtures in a house, though attached by screws to pipes, are not part of the realty.

A person in possession of a house and land, under an agreement with the owner for a deed, put a hot air furnace into the house, and then sold and constructively delivered the furnace to a third person. Afterwards, but while the furnace remained in the house, it was attached by an officer on a writ in an action by the owner of the house against the person with whom he had made the agreement for a deed. The purchaser removed the furnace, and while it was in his possession the officer seized it on an execution issued in the above mentioned action, and sold it. Held, that even if the furnace was part of the realty when put into the house, the purchaser could maintain an action against the officer for the conversion of it by him after it was removed from the house: *Towne v. Fiske*, 127 Mass., 125.

A lease of premises, upon which were certain trade fixtures, excepted ordinary tenant's fixtures. Upon the lease was indorsed a memorandum under seal by both parties, containing a

list of the trade fixtures, and a stipulation that they should remain upon the premises during the term. Held, that the property in the trade fixtures passed to the tenant, subject to an obligation not to remove them during the term: *Martin v. Elsasser*, 5 Victorian Law Rep. (Law), 85.

Where a sheriff had levied upon certain machinery as personal property, which was in law fixtures, and was about to tear down the walls of a building to remove the same; held, the remedy at law was inadequate, and that a court of equity had jurisdiction, by injunction, to prevent the threatened wrong: *Jenny v. Jackson*, 6 Bradwell (Illa.), 32, citing 2 Sto. Eq. Jur., §§ 828, 861; *Adams's Eq.*, 208.

A contract for the sale of fixtures is not within the statute of frauds so as to require a memorandum in writing. A covenant between lessor and lessee that the lessor should have the option of purchasing buildings, erections, engines, machinery, mining tools and implements, and other articles upon the demised premises, at the expiration of the term, at a valuation to be agreed upon between the lessor and the parties then being in lawful possession of the premises by virtue of the lease, and, in case of disagreement, to be determined by arbitration, is not a covenant running with the land—at all events, so far as the movable chattels are concerned. *Semble*, that such a covenant is severable, and would run with the land as regards fixtures: *The Malmsbury, etc., v. Tucker*, 3 Victorian Law Rep. (Law), 218.

Lessor covenanted with lessee that he would, at the expiration of the term, pay him, his heirs or assigns, a valuation for his buildings on the land demised: Held, *Cameron, J.*, dissenting, that the covenant was neither wholly spent in the event of destruction by fire of the building then in existence, nor necessarily limited to the then value of the existing building, but that the increased value of subsequently erected buildings could be claimed, at the expiration of the term, against the landlord. Held, also, affirming the judgment of *Wilson, C.J.*, that the assignee of the term, and of all claims under the covenants in the lease, could, as the assignee of a chose in action, sue in his own name the executors of

the covenantor, under R. S. O., ch. 116, sect. 7: *Matter of Haisly*, 44 U. C. Q. B., 345.

It was stipulated in a lease, that if the lessee would erect a certain building upon the demised premises, the lessor would, at the expiration of the term, pay to the lessee the value thereof, such value to be affixed by appraisers chosen by the parties. Appraisers were chosen, who, upon a thorough examination of the building, made a valuation. The lessor refused to pay the appraised value, and the lessee brought suit to compel payment. Held, that the lessor could not, independently of the appraiser's report, show the value of the building, nor introduce evidence of damages sustained by the lessee's failure to erect a more substantial building; that, having made no objection to the character of the building until after the award, such objection would be considered as waived; that his having no personal knowledge of the building until after the appraisement, the appraisers being fully advised thereof, was immaterial; and that his ignorance, in the absence of fraud or concealment, was his own laches: *Yeatman v. Clemens*, 6 Missouri App. Rep., 210.

Plaintiff leased certain premises from D., agreeing to give up possession on receiving six months' notice if D. sold during the term, with the right, if he had any crop in the ground, of harvesting it, or if not, to be paid for the summer fallow. In August of the first year, before a crop was put in, D. sold to defendant, of which the plaintiff had notice, and that possession would be required on the 1st of April. Defendant refused to pay the plaintiff for the crop subsequently put in by him, and converted it to his own use.

Held, that the plaintiff was entitled to recover, in trover, from defendant the value of the crop so converted, *Cameron, J.*, dissenting, on the ground that the plaintiff's remedy was against the lessor, not against defendant.

Held, also, that the option to pay for the crop or for the summer fallow was to be exercised by the lessor.

Semble, per *Cameron, J.*, that it might be exercised at any time before harvesting: *Harrison v. Pinkney*, 44 U. C. Q. B., 509.

Plaintiff and J. (to whose rights

plaintiff subsequently succeeded) leased of R. certain premises for twenty-one years from May 1, 1855. R. covenanted that if the lessees erected a building, as specified, upon the demised premises, he would advance \$20,000 to be secured by the lessees' bond and a mortgage upon the leasehold interest, and at the termination of the lease he would, at his option, either pay the appraised value of the building or execute a new lease for a further term. The building was erected, and the money loaned and secured as covenanted. In May, 1858, the lessors executed to C., defendant's testator, a sub-lease of the premises for seventeen years and six months from Aug. 1, 1858. C. covenanted "to assume, pay off, and discharge" said mortgage. In August, 1858, said lessees executed to C. another instrument, by which they agreed, upon his compliance with the covenants in said sub-lease, at the expiration of the term therein specified, "at and upon the application" of C. or assigns, to grant a renewal for the further term of eighty-five days, and to execute an assignment of the right of said lessees to a renewal of the original lease, or to a payment of the moneys awarded to them for the value of the buildings and improvements. C. assigned the sub-lease and agreement; the holder thereof made no application for a renewal, as authorized by the agreement, but on the contrary gave written notice that he would not avail himself of such right; and at the expiration of the term specified in the sub-lease surrendered the premises. Plaintiff paid the mortgage, received from the lessors an agreed price for the improvements, and took a new lease. In an action on the covenant of C. to pay the mortgage, held, that plaintiff was entitled to recover; that under said covenant a cause of action arose upon failure of C. to pay the mortgage when it became due and payable; that conceding the sub-lease and subsequent agreement were to be taken and construed together, the covenant of C., in the former, was not modified or affected by the latter: also, that as neither C. nor his assigns availed themselves of the privileges of renewal, all their rights terminated at the expiration of the term specified in the sub-lease; the original lessees were

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at liberty to deal with the property as they chose, and their subsequent action furnished no defence: *Hume v. Hendrickson*, 79 N. Y., 117.

In a lease of twenty-one years, it was covenanted that if the tenant, during the first seven years, or if the landlord consented any time during the residue of the term, should erect upon the land a house two stories or more in height, and constructed as therein specified, at the end of the term would pay for the value of the building, or give a further term of twenty-one years; and that said second lease should provide for a further renewal of twenty-one years, in all cases in which there should be erected and then standing on the premises a substantial dwelling house three stories or more in height, constructed as the law required, in the part of the city where the premises were located, or if the landlord should not agree to such third renewal, that he would pay the value of the building. At the expiration of the first lease, the landlord agreed and did grant a renewal for the further term of twenty-one years, which renewed lease recited, that as the parties could not agree upon the construction of the covenants in the first lease as to what covenants were to be inserted in the renewed lease, it was, to avoid dispute, agreed that the

second lease should contain all the covenants which, according to the true construction of the first lease, it should contain. Held, that the omission in the second lease of the condition in respect to a further renewal did not make it obligatory, under the second lease, that the plaintiff should give a third lease of twenty-one years, with a covenant for renewal provided a dwelling house of three or more stories should then be standing; that the true construction of the meaning of the language employed was that, if the landlord did not, at the expiration of the first lease, give a second one, he should pay for the two story building, and that if a dwelling house of three or more stories should be erected and standing at the expiration of the second lease, that he would give a further lease for twenty-years or pay for the three story building. If such a building had been erected and was then on the premises; that the instrument simply provided for the contingency of two renewals, and had no provision in it for anything beyond that.

A written lease is to be construed, if possible, so as to give effect to the intention of the parties, which is to be gathered from the whole instrument: *Orphan Asylum Society in the City of N. Y. v. Waterbury*, 8 Daly, 85.

[10 Chancery Division, 118.]

M.R., Nov. 18, 1878.

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*SMITH V. BUTCHER.

[1878 S. 268.]

Will—Gift of Personal Estate to A. for Life with Remainder to his "Lawful Heir"
—*Literal Construction.*

Bequest of personal estate to "the children of A. during their lives, and on the decease of either of them, his or her share of the principal to go to his or her lawful heir or heirs":

Held, that "lawful heir or heirs" must be read literally, and not as meaning "next of kin," "executors or administrators," or "children."

Mounsey v. Blamire (!) disapproved of.

ROBERT BUTCHER, who died in 1820, by his will dated in 1818, not attested so as to pass real estate, made the following bequest:—

(!) 4 Russ., 384.

"The rest of my property which may arise from debts due to me, money in the funds, or otherwise, from the sale of my furniture, books, and from any other source, I desire may be placed in the public funds, and the interest arising therefrom to be equally divided among the children of my brother during their lives, and on the decease of either of them, his or her share of the principal to go to his or her lawful heir or heirs."

Part of the testator's residuary estate consisted of a leasehold house which, in 1876, was sold by his trustees, the proceeds being invested in £2,039 consols.

The testator's brother had six children, and on the death of the survivor of them the question arose who were the persons entitled to the fund under the words "lawful heir or heirs."

The action was brought for the purpose of having the true construction of the will and the rights and interests of all parties in the fund ascertained and declared, and now came on upon motion for judgment.

Farwell, for the plaintiffs, the heirs and co-heiresses-at-law of the six children of the testator's brother: I submit that the words "lawful heir or heirs" should be construed *literally, and that the heirs-at-law take as *personæ* [114 *designatæ*: *De Beauvoir v. De Beauvoir* ⁽¹⁾; Sheppard's Touchstone ⁽²⁾. A gift of personal estate to "heirs" is construed in the same way whether the gift is immediate or, as here, in remainder: *De Beauvoir v. De Beauvoir* ⁽³⁾; Hawkins on Wills ⁽⁴⁾.

[JESSEL, M.R., referred to *Low v. Smith* ⁽⁵⁾, where Vice-Chancellor Kindersley held the word "heirs" to mean "next of kin."]

In that case there were words of distribution from which it was gathered that the testator meant "next of kin."

JESSEL, M.R., also referred to *Danvers v. Earl of Clarendon* ⁽⁶⁾.

W. W. Karlake, for the defendants, some of the next of kin of the children: The principle is that where the word "heir" is used to denote succession, as here, it means the person who would succeed to the property according to its nature and quality: *Mounsey v. Blamire* ⁽⁷⁾.

[JESSEL, M.R.: That is a very unsatisfactory authority: it stands alone, I think. The rule is to adopt the legal and

⁽¹⁾ 3 H. L. C., 524.

⁽²⁾ Page 446.

⁽³⁾ 3 H. L. C., 524, 557.

⁽⁴⁾ Page 92.

⁽⁵⁾ 2 Jur. (N.S.), 344.

⁽⁶⁾ 1 Vern., 35.

⁽⁷⁾ 4 Russ., 384, 387.

technical meaning of the word unless it is controlled by the context—as I stated in *Leach v. Jay* (').]

In *Gittings v. M^cDermott* ('), the Lord Chancellor (Lord Brougham) appears to assent to the principle laid down in *Mounsey v. Blamire*.

[JESSEL, M.R.: Is there any case in which, under a gift in remainder of personal estate, the word "heirs" has been held to mean "next of kin"?]

In *In re Philp's Will* ('), where the testator directed that a sum of stock should, after the death of his wife, be divided among his children then living, "or their heirs," [15] the word "heirs" was *held to mean "next of kin": and in *Wingfield v. Wingfield* (') a gift of personalty in remainder to "heirs" was similarly construed. I therefore ask your Lordship to lay down as a principle that where personal estate is given by will to A. for life with remainder to his "heirs," the word "heirs" means the persons who would take the property supposing he died intestate; and that it makes no difference whether the gift is in possession or substitution, or in remainder or succession.

Barratt, for the defendant, the legal personal representative of one of the children: I submit that the word "heirs" should be read as "executors and administrators," and that the children took absolutely by analogy to the rule in *Shelley's Case* (') by which a limitation of real estate to a man for life with remainder to his heirs gives him the absolute estate in fee: *Gittings v. M^cDermott* ('); *Thompson v. Thompson* ('); *Theobald on Wills* (').

[JESSEL, M.R.: *Powell v. Boggis* (') seems to be the nearest case to yours; but it is useless to rely upon it, as the decision depended on the particular construction of the words of the will.]

W. M. Spence, for the trustees of the will, suggested that "heirs" might mean "children."

Farwell, in reply.

JESSEL, M.R.: I think the words "heir or heirs" must bear their ordinary and primary meaning.

The true rule is that laid down by Vice-Chancellor Kindersley in *Low v. Smith* (') where he says, referring to Lord St. Leonards' decision in *De Beauvoir v. De Beauvoir* ('), "There was no peculiarity in this particular question; it

(¹) 6 Ch. D., 496; 23 Eng. Rep., 108.

(²) 2 My. & K., 69.

(³) Law Rep., 7 Eq., 151.

(⁴) 9 Ch. D., 658; 26 Eng. Rep., 416.

(⁵) 1 Rep., 93 b.

(⁶) 2 My. & K., 69, 79.

(⁷) 1 Coll., 388.

(⁸) Page 224.

(⁹) 35 Beav., 535.

(¹⁰) 2 Jur. (N.S.), 344.

(¹¹) 3 H. L. C., 524.

was a mere application of what was the ordinary elementary rule of construction, that for the purpose of construing any word in any will that ever was executed, *such word [116 must receive its ordinary and primary meaning, unless the court is satisfied that the testator intended to use it in a secondary and less proper sense.”

That applies to all wills, and not the less so when any particular word used by a testator is a technical word and a word of art, which is less difficult to construe.

Now it is quite possible that the testator in this case did not mean what by his expressions he must be taken to have meant. If I were at liberty to guess what he meant by the words “lawful heir or heirs,” I should guess that he meant “children;” but I am not at liberty to guess; I must take the words of the will as they stand.

What he has done is this. By his will—which was not attested so as to pass real estate, and therefore passed only personal estate—he makes the following bequest:—[His Lordship read it.] The question is what that means. Now there is no expression which has a clearer meaning in law than the expression “lawful heirs.” It means the person or persons who either alone or together would succeed to the fee simple estate of which the intestate ancestor died seised in possession at the time of his death. That is what it means: there can be no doubt as to what it means.

It is suggested that the testator in making this bequest to the “lawful heir or heirs” meant “children,” and that therefore they take, but that is not the primary nor natural meaning of the word “heirs.”

Then it is said that there is a rule as to real estate, called the rule in *Shelley's Case* (¹), which supports the contention that the testator intended to give an absolute interest to his brother's children, an interest or estate corresponding to the legal estate in fee simple in real estate; and it is said that although that rule does not directly apply to personal estate at all, it may nevertheless be applied by analogy as indicating the testator's possible intention. It has, however, in my opinion, no application to the present case.

In *Lou v. Smith* (²) the very point occurred. In that case there was a gift of personalty, after the death of A., to be equally divided among his “legal heirs.” The question as the *Vice-Chancellor put it, was simply whether [117 “legal heirs” meant “heirs” in the strict primary sense, or “next of kin.” The rule in *Shelley's Case* (¹) did not ap-

(¹) 1 Rep., 93 b.

(²) 2 Jur. (N.S.), 344.

ply at all, nor did the Vice-Chancellor in any way suggest that it could.

Then, that artificial rule of construction not having anything to do with this case, what have we in this will to control the ordinary meaning of the word "heirs"? Nothing at all, except that, as the testator bequeaths personal estate to "heirs," he means, so it is said, that it is to descend to the persons who can alone succeed to personal estate and not to the persons who can succeed only to real estate.

But that is concluded by decisions to the contrary two or three hundred years old, which are all summed up by Lord St. Leonards in his speech in *De Beauvoir v. De Beauvoir* (1).

Therefore that will not do. Well, that being out of the way, there is nothing else at all to be found in this will. It is merely a gift of personal estate in remainder to "heirs," and it makes no difference whether the gift is an immediate gift in possession, or a gift in remainder.

That again is settled by a long line of authorities, ending with *De Beauvoir v. De Beauvoir*.

The result is that this is really nothing more than a simple gift of personal estate to the children of A. for their lives with remainder to their heirs. There is nothing else.

That being so, I hold that the testator has used expressions which mean that the right heirs of the children are to take, and I so decide.

Cost of all parties out of the fund.

Solicitors: *Thompson & Debenhams*.

(1) 3 H. L. C., 524.

See *ante*, p. 424. note.

[10 Chancery Division, 118.]

M.R., Nov. 30, 1878.

118] **In re NATIONAL FUNDS ASSURANCE COMPANY.*

Company—Winding-up—Companies Act, 1862, s. 165—Companies Act, 1867, s. 27—Share Warrants to Bearer—Paying Interest out of Capital—Assent of Company—Liability of Directors—Liquidator—Summons by—His Position and Powers.

The powers of a liquidator of a limited company are more extensive than those of the company prior to the winding-up order: for instance, he can assert as against the members of the company rights which the company itself could not have asserted.

Dictum of Lord Hatherley in *Waterhouse v. Jamieson* (1) approved of.

Under sect. 165 of the Companies Act, 1862, either the liquidator, or a creditor, or a contributory of a limited company in course of being wound up, may apply to the court for an order to compel a director to repay moneys of the company misap-

(1) Law Rep., 2 H. L., Sc., 32.

plied by him; and if the liquidator makes such an application, it is unnecessary to consider whether he does so as representing the company or as representing the creditors, he having, upon the literal construction of the section, an independent right to apply in a proper case.

The creditors of a limited company are entitled, by virtue of a contract between themselves and the company, to be implied if not expressed, to have the capital of the company reserved for payment of their claims; consequently, the repayment by the directors to the shareholders of the whole or any part of the capital, either in the form of interest on share warrants issued under the Companies Act, 1867, s. 27, or otherwise, and whether such repayment be made with the sanction of the shareholders or not, is, unless such repayment be expressly authorized by the articles of association, *ultra vires* and a breach of trust; and if the company be ordered to be wound up the court will, upon an application either by the liquidator or by a creditor, under sect. 165 of the Companies Act, 1862, order the directors jointly and severally to make good the amount of capital so repaid, but, in case the repayment has been made with the sanction of the shareholders, without prejudice to the right of the directors to recover the amount from the shareholders.

The articles of association of a limited insurance company provided (122) that "the directors might, without the sanction of a general meeting, pay interest at the rate of 5 per cent. per annum upon the paid-up capital."

The company, desiring to raise further capital, passed a resolution empowering the directors, under the Companies Act, 1867, s. 27, to issue to members who had paid up the full amount of their shares, share warrants payable to bearer. Share warrants were issued accordingly, each warrant declaring that the bearer was entitled to interest at 5 per cent. per annum on the amount therein specified.

The company never having made any profits, the interest on the warrants *was from time to time paid to the holders of them out of capital by the [119] directors with the express sanction of the general body of shareholders, and on the assumption that such payment was authorized by article 122.

The company having been ordered to be wound up, the liquidator applied by summons under sect. 165 of the Companies Act, 1862, that the directors might be ordered jointly and severally to pay to him the amount so paid for interest to the holders of the share warrants:

Held (1.), that upon the literal construction of sect. 165 the liquidator was entitled to make the application, independently of the question whether he, as representing the company, could sue its own agents, or whether he had an independent right to represent the creditors:

(2.) That the directors had, in making payments to shareholders out of capital, acted *ultra vires* and committed a breach of trust, and that they were therefore liable jointly and severally to make good the amount of such payments, but without prejudice to their right to recover from each shareholder the amount of capital he had received.

THE National Funds Assurance Company, Limited, was established with a nominal capital of £250,000, divided into £5 shares.

The articles of association contained various provisions for the application of the property and capital of the company in discharge of the claims of policy-holders and others; for setting apart a reserve fund for the same purpose; and for creating out of the insurance premiums a guarantee fund to be invested in government securities as an additional security to the policy-holders in particular; the expressed object of these provisions being to increase the stability and solvency of the company.

The articles also empowered the directors to issue to mem-

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bers of the company who had paid up the full amount of their shares "share warrants to bearer"; and then provided as follows:—

"122. The directors may, without the sanction of a general meeting, pay interest at the rate of 5 per cent. per annum upon the paid-up capital of the company.

"123. No dividend shall be payable except out of the profits arising from the business of the company, but (without prejudice to any preferential or guaranteed dividend) no dividend shall exceed the sum recommended to such meeting by the board."

In December, 1872, the company, desiring to raise further capital, passed the following resolution:—

"That in accordance with the provisions of the Companies Act, 1867, s. 27, the directors be empowered to issue [20] to members of the *company who have paid up the full amount of their shares share warrants payable to bearer."

Share warrants were accordingly issued in the following form:—

"No. —, 187—. The National Funds Assurance Company, Limited, 33 Finsbury Square, London, E. C.

"Share warrant to bearer £—.

"The bearer hereof is entitled to — fully paid-up shares of £5 each in the capital stock of this company.

"—, Directors.

"Countersigned — for and on behalf of the company.

"The bearer is entitled to interest at the rate of £5 per cent. per annum on the sum of £— from the date hereof. Such interest becomes due and payable at the registered offices of the company on and after the 1st of April and the 1st of October in each year.

"Note.—In addition to such interest shareholders are entitled to twenty per cent. of the net profits of the company to be declared every three years."

A considerable number of these share warrants were taken up by shareholders of the company, including the directors, or some of them.

At the annual meetings of the company held in 1872, 1873, and 1874, and which were attended both by shareholders who held share warrants and by ordinary shareholders, balance-sheets showing the financial position of the company were produced and read, from which it appeared that the company had never raised sufficient capital for carrying on its business; that it had never made any profits; and that

in 1872 there was a large deficit, which was increased during the two following years. The balance-sheets also showed the amounts which remained due for interest on the share warrants.

It appeared that at one at least of these meetings considerable discussion took place between some of the shareholders and the directors as to the right of the company to allow interest on the share warrants, but that eventually the payment of it was not only not objected to but sanctioned by the shareholders present.

During the years 1873, 1874, and 1875, sums amounting altogether *to £1,311 7s. 2d. were paid by way of [12] interest to the holders of share warrants, although, as it appeared from the evidence, the company never made any profits or had any other income available for such payments.

Ultimately the company, having lost nearly the whole of its subscribed capital, and having become hopelessly insolvent, was ordered to be wound up.

This summons was then taken out by the liquidator under sect. 165 of the Companies Act, 1862, asking that those directors who were on the board at the times of payment of the interest on the share warrants might be ordered, as "being directors of the company and trustees on behalf of the shareholders and creditors," jointly and severally to pay to him the whole amount, £1,311 7s. 2d., "being the sum improperly paid by the said directors for interest or dividends to the shareholders;" and further, that such directors might be ordered to repay to the liquidator "such sum paid or received by them respectively for interest or dividends."

The directors stated in evidence that they were always advised and always believed that under the 122d article of association they were justified in paying interest on the share warrants.

Ince, Q.C., and Seward Brice, for the liquidator: It is clear that as the company made no profits, and had no other available income, the interest on the share warrants must have been paid out of capital, a proceeding which was manifestly *ultra vires* and improper; and the fact that the payment was made with the consent of the general body of shareholders makes no difference.

The law is thus laid down in *Lindley on Partnership*(¹): "With respect to companies, however, there are reasons why capital and money borrowed should not be applied in making payments to shareholders, even although they may all consent. In the first place, such an application of the money

(¹) 3d ed., p. 814.

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is calculated to deceive the public, and can hardly be made for any honest purpose; and in the next place, capital raised, or money borrowed, in order to carry on the business [22] of the company, cannot be properly applied *for such a wholly different purpose as that of paying dividends to the shareholders."

[They were stopped by the court.]

Chitty, Q.C., *W. W. Cooper*, and *Cozens-Hardy*, for the directors: In the first place, this summons is wrong in point of form; for the liquidator, who merely appears in right of the company, cannot recover what the company itself could not have recovered, *Waterhouse v. Jamieson* ⁽¹⁾; and the company could not have recovered this money from these directors, they being merely its agents, *Turquand v. Marshall* ⁽²⁾; we also refer to your Lordship's argument in that case ⁽³⁾. The liquidator has no independent right to sue on behalf of the creditors of the company; he can only support their rights by virtue of his being the representative of the company, and through the company, *In re Duckworth* ⁽⁴⁾; but as the company or its representative cannot sue its own agents, and there are no creditors appearing on this summons, there is no one here in a position to enforce this claim.

In the second place, it is not alleged that the balance-sheets were fictitious, or that any fraud was attempted against either the shareholders, the creditors, or the public. The payments in question were authorized by the 122d article of association; at all events the directors acted *bona fide* and under the belief that they were acting within the powers conferred upon them by the articles; and, moreover, the nature of the transaction was fully discussed by the shareholders, who themselves assented to the payments now sought to be impeached. Under such circumstances the directors cannot now be charged with any personal liability: *Stringer's Case* ⁽⁵⁾; *Rance's Case* ⁽⁶⁾.

There is no case to be found in which the court has gone the length of granting an application by a liquidator for an order to make the directors of a company repay moneys paid by them under the shareholders' authority.

[23] **Ince*, in reply: Upon the question of form, the liquidator does not represent the company alone, he represents the creditors also, and in that capacity can proceed against any director or other officer of the company for

⁽¹⁾ Law Rep., 2 H. L., Sc., 29.

⁽²⁾ Law Rep., 4 Ch., 376.

⁽³⁾ Law Rep., 6 Eq., 128.

⁽⁴⁾ Law Rep., 2 Ch., 578, 580.

⁽⁵⁾ Law Rep., 4 Ch., 475, 492, 493.

⁽⁶⁾ Law Rep., 6 Ch., 104.

any misfeasance or breach of trust. Unless the liquidator does represent creditors, the 165th section of the act of 1862 is unintelligible.

In *Waterhouse v. Jamieson* (1), Lord Hatherley expresses it as his opinion (2), though he does not actually decide the point, that the liquidator, being bound to collect all the assets of the company and distribute them among the creditors, is in a position in which he may assert rights as against the company, and assume a position against its members which the company itself possibly might not be in a position to assert.

[JESSEL, M.R.: My view of the act certainly agrees with that of Lord Hatherley. It seems to me that the powers of the liquidator are more extensive than those of the company. For instance, under the 38th section, he can make a member of the company pay what the company itself could never have made him pay; for he can enforce contributions from the member which the company could not have enforced. However, if necessary, I will allow the summons to be amended by putting in a creditor, to argue the question independently.]

Evans v. Coventry (3) is a distinct authority that directors can be compelled to repay a dividend improperly declared by them; and that is confirmed by *Stringer's Case* (4). This is a stronger case than *Evans v. Coventry*, for there the creditors of the company—which was an unlimited insurance company—had an unlimited fund to resort to, whereas here they can only look to a limited fund. This limited fund having been intended as a security, and being the only security, for the creditors, the directors and shareholders had no right to distribute any part of it amongst themselves. Payment of what was really a preferential dividend out of capital was certainly a breach of trust, besides being a *misapplication of the moneys of the [124 company, and we are therefore clearly within the 165th section.

Chitty, in reply, upon *Evans v. Coventry* (5): In that case the plaintiffs, the insured, had a special right by contract to have the company's funds applied in a particular way, and the directors were held responsible for a misapplication of those funds. But here the directors were acting under the express authority of the shareholders, and that being so, if there is any liability at all, the shareholders

(1) Law Rep., 2 H. L. Sc., 29.

(2) 25 L. J. (Ch.), 489; 8 D. M. & G.,

(3) Law Rep., 2 H. L. Sc., 32.

835.

(4) Law Rep., 4 Ch., 475.

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M.R.

who have received this money should at least participate with the directors in the responsibility of refunding it.

JESSEL, M.R.: The question is one of great difficulty by reason of the authorities, and my decision may possibly not be reconcilable with one or more of them. In the view which I take of them, I think they do not really, when fairly considered, prevent my arriving at the conclusion at which I should have arrived had there been no authorities at all.

I will first of all consider the case as it presents itself to my mind independently of the decisions. The 165th section of the act of 1862 says, "Where, in the course of the winding-up of any company under this act, it appears that any past or present director . . . has misapplied . . . or become liable or accountable for any moneys of the company, or been guilty of any misfeasance or breach of trust in relation to the company, the court may, on the application of any liquidator, or of any creditor or contributory of the company . . . examine into the conduct of such director . . . and compel him to repay any moneys so misapplied or retained, or for which he has become liable or accountable."

Now I will say a word or two as to the person who may apply under that section. I read the section literally; that is, as I understand it, the liquidator, or a creditor, or a contributory, may apply: it is for the court to put the section in force if it thinks proper; and if it is proper to put it in [25] force, I take it *that the order may be made on the application of any of those persons.

It does not appear to me to be necessary to inquire what the position of a liquidator suing third persons or suing shareholders may be. All I have to do is to obey the act of Parliament, which is clear, plain, and unambiguous in its terms. Therefore, I think the decisions which have been cited have no application to this part of the case; and I think also that it is plain, after *Webb v. Whiffin* ⁽¹⁾ and other decisions of the House of Lords, that after the winding-up of a company new rights are given by the act of Parliament—rights which did not exist before the winding-up, and rights which can be enforced only under the winding-up. I think this altogether disposes of the objection as to the liquidator being the moving party; but to avoid any possibility of question—not because I entertain any doubt about it, but out of respect to some of the *dicta* which may possi-

(1) Law Rep., 5 H L., 711.

bly be understood in the sense in which they have been urged upon me—I will allow the summons to be amended by adding a creditor.

So much for the form of the application. Now for the summons itself. The substance of it is this. A limited assurance company—that is, an assurance company with limited liability—has capital subscribed which, as I read the articles of association taking them as a whole, is to be applied as capital and in no other way; that is, it is to be applied to purposes to which capital is properly applicable, namely, payment of the debts, obligations and liabilities of the company. I cannot find from the beginning to the end of these articles anything like a power to return capital. The only clause which was at all relied upon was the 122d, which says that, “the directors may, without the sanction of a general meeting, pay interest at the rate of 5 per cent. per annum upon the paid-up capital of the company.” Then the 123d article says that no dividend shall be payable except out of profits: and dividends can only be paid with the sanction of a general meeting.

It does not appear to me that the 122d article, rightly considered, authorizes the payment of interest out of capital, but only out of income. The very words of it show me that, although they *may not show it to everybody, and [126 indeed are asserted not to have shown it to the directors. The words, “without the sanction of a general meeting,” I think were intended to distinguish that which the directors might do without that sanction from that which the directors are to do only with that sanction. They can only pay the dividend with the sanction; they may pay the interest without the sanction; but unless I find in the clearest and plainest terms a power to the directors to return the capital to the shareholders by instalments of 5 per cent.—that is, to return the whole capital in twenty years—I should not so read the articles; and, in my opinion, these articles do not authorize the return of capital.

I now come to the next point. If there is no authority to return capital, did the directors return capital? When I look at the balance-sheets which they themselves prepared, and the evidence in the case, in my opinion there can be but one answer—they clearly did. They had nothing else to pay it out of: income they could have had none. [His Lordship then referred to the balance-sheets for 1872, 1873, and 1874, to show that the company had not made any profits whatever, and that there had been a large and constantly increasing deficiency, and continued:]

Upon reading these balance-sheets, can it be pretended for one moment that there was any available income to pay this large loss? I am satisfied that every one of these directors who concurred in the payments in question knew that they were payments out of the small remnant of capital that remained, and out of nothing else. That I am satisfied of as a fact.

I now come to another fact. It appears that this company was divided into two sorts of shareholders. The one sort took this thing called a share warrant, and the other sort did not. Both kinds of shareholders attended the annual meetings, and it does appear that the directors did produce these balance-sheets, and that they were read, and that, in spite of their being so produced and read, the shareholders present consented to the directors paying the interest to the warrant shareholders and not to the other shareholders.

It is then said, that would prevent any action against the directors. If there was no power to do this thing vested in [27] the *directors, there was no power to do it at the shareholders' meeting. It must have been equally *ultra vires* to give 5 per cent. out of capital back to the shareholders as to give the whole capital *uno flatu* by a single resolution of the meeting; and, with the knowledge in the possession of the directors, I really cannot think it made any substantial difference what the proportion was, they knowing what they were doing when they returned what was in fact capital.

That being so, and the action of the directors being *ultra vires* and improper, is it within the terms of the section? Let me see who has the right to complain. The creditors have the right, as I read the articles, considering the nature of the company, to have the capital kept for the payment of their claims. I think it quite immaterial that the right is not expressed in the same terms as was done in *Evans v. Coventry* ('). That is the substance of the right. The limited company trades upon the representation of being a limited company with a paid-up capital to meet its liabilities. It is wholly inconsistent with that representation that the company, having its capital paid up, should pay it back to its shareholders, and give the creditors nothing at all.

It appears to me, therefore, that the right of the creditors is clear, and I think it can be enforced either by one of them or by the liquidator.

Then the directors say that, even assuming all that has

(') 25 L. J. (Ch.), 489; 8 D. M. & G., 835.

been said, they acted *bona fide*, and that their shareholders who took the money are liable as well as themselves. That may be so, if they are liable at all, which they deny. They say the creditor has no rights at all; for the argument is pushed to that extent before me. It is said the creditors cannot sue except through the company, and the company has acquiesced, or done something of that kind, as between themselves and the directors. Then I say push your argument to the extreme, and take the case of a company which, with £100,000 worth of paid-up capital, owes £100,000 worth of debt, and has no means to meet it except the £100,000 paid-up capital. According to the argument of the respondents, the company can meet and divide the £100,000 of its paid-up capital among its shareholders, and you cannot make anybody liable for getting rid of the capital, [128 not even the managing partners of the concern.

Of course if the argument is good for 5 per cent. it is good for the whole, and it does not appear to me to be an argument which ought to receive much attention from a court of justice. If I were bound by the decisions to say that was so, I should bow to them, but I think I am not so bound.

That being so, the only question which remains is, have the directors, in the words of the act of Parliament, "misapplied any moneys of the company"? I think they have misapplied them by dividing the capital among a portion of their shareholders. That appears to me to be a plain case of misapplication within the very terms of the section.

I think also they have been guilty, within the meaning of the 165th section, of a "breach of trust in relation to the company," by dividing part of the capital among their shareholders, and that they are liable for doing it. Ought I to make them account? I think I ought. As to saying they did it *bona fide*, I think it is impossible to come to that conclusion; a man may not intend to commit a fraud, or may not intend to do anything which casuists might call immoral, and he may be told that to misapply money is the right thing to do, but when he has the facts before him—when the plain and patent facts are brought to his knowledge—as I have often said, and I say now again, I will not dive into the recesses of his mind to say whether he believed, when he was doing a dishonest act, that he was doing an honest one. I cannot allow that man to come forward and say, "I did not know I was doing wrong when I put my hand into my neighbor's pocket and took so much money out and put it into my own." It is impossible in a court of

justice to call a particular act a *bona fide* act simply because a man says that he did not intend to commit a fraud.

This court is not, as I have often said, a court of conscience, but a court of law; and when a man misappropriates money with a knowledge of all the facts, I cannot allow him to say that he is not liable simply because somebody or other told him that he was not doing wrong, or that somehow or other he convinced himself that he was not doing wrong.

That being so, it appears to me the order should be made [29] as *asked, limiting of course the liability of each director to those sums which he participated in paying. As regards any one or other of the directors who has paid his proportion, of course it must be without prejudice to his right to call upon this court to enforce against the shareholders who did receive the sum of money, repayment by summons or otherwise, and that should be provided for in the order. In each transaction I hold that each director is jointly and severally liable to make the payment good.

Now as regards the authorities. As far as I understand the case of *Evans v. Coventry* (*), it is a case in favor of the view I have held. I do not think it is easy to distinguish the case on the ground of express contract with the directors that the capital should be forthcoming. I think there was such a contract here; if not, there was an implied contract.

As regards the other authorities, I think *Rance's Case* (*) is an authority for making a man pay back the money he has received, but it is no authority for making him not liable to pay back what somebody else has received. All that was asked there was that a man should repay the money which he had himself received. That case, therefore, has no application to the present.

As I read *Stringer's Case* (*), it is not an authority on the subject. Neither the decision nor the *dictum* goes to the point.

As regards the other authorities which were cited with reference to the position of the liquidator—*In re Duckworth* (*) and *Waterhouse v. Jamieson* (*)—the observations of Lord Cairns and Lord Westbury refer simply to the cases before them, and were not intended to apply, and do not, in my opinion, apply to an application under the 165th section of the act.

I therefore come to the conclusion that the authorities

(*) 25 L. J. (Ch.), 489; 8 D. M. & G., 835.

(*) Law Rep., 6 Ch., 104.

(*) Law Rep., 4 Ch., 475, 492, 493.

(*) Law Rep., 2 Ch., 578, 580.

(*) Law Rep., 2 H. L., Sc., 29.

are not at variance with the decision which I have pronounced.

Solicitors: *E. Beall; Routh, Stacey & Castle; W. Evans.*

The relations existing between the corporation and its trustees is mainly that of principal and agent; and the relation between the trustees and its depositors is similar to that of *cestui que trust*: *Hun v. Cary*, 59 How. Pr., 439, Court Appeals; *Cholean v. Allen*, 70 Mo., 290.

Where the trustees of a savings bank recklessly and extravagantly invested a large sum in a banking house, it was held that a receiver of the bank could recover of them jointly or severally for the damages resulting from such act: *Hun v. Cary*, 59 How. Pr., 439, affirming 59 How., 426.

The Attorney-General may maintain a suit on behalf of the people against trustees or other managers of a corporation, compelling them to account for official misconduct in the management and disposition of the funds of the corporation, and compelling them to pay the same to the corporation: *People v. Bruff*, 60 How. Pr., 1.

A contract between the officers of a corporation, by which such officers were to derive advantage or profit from their positions by purchases made nominally for the company, but really for themselves, is void as against the other stockholders: *Blair, etc., v. Walker*, 50 Iowa, 376.

Assets of an incorporated company are regarded in equity as held in trust for the payment of the debts of the corporation.

Courts of equity will enforce the execution of such trusts in favor of the creditors, even when the matters in controversy may not be cognizable in a court of law.

Directors will not be permitted by a court of equity to obtain any undue advantage for themselves, to the injury of those for whom they are acting in a fiduciary relation.

A railroad corporation was insolvent, and unable to pay its commercial and business paper, and was largely indebted to the first named respondent. Measures were devised by the directors to pay or secure that claim without making any corresponding provision for the

other creditors. Votes of the executive committee were passed, approving the schedules of claims of the said respondent, who was a member of the said committee, and present at the meeting. At a subsequent meeting of the directors, of which the said respondent was one, the action of the executive committee was approved. The road was put into bankruptcy and the complainants appointed assignees; they brought a bill praying for an account of the funds, notes and bonds put into the hands of the respondents, and that they should be decreed to pay over to said assignees such sums as might be found due them as such.

Held, that the complainants were entitled to a decree that the votes of the executive committee, and of the directors, were in fraud of the complainants as assignees of the bankrupt corporation; that the respondents had acquired no valid rights to the funds; and that the respondents be perpetually enjoined from setting up any right to the bonds or funds by virtue of said votes: *Bradley v. Converse*, 4 Cliff., 376.

A president of a corporation is a trustee, and will not be permitted to create such a relation between himself and the trust property as will make his own interest antagonistic to that of his beneficiary.

A president of a corporation who has voluntarily purchased a small debt against the corporation, will be enjoined from levying an execution for the payment of a balance on the same, where he has already taken valuable property of the corporation in part payment thereof: *Brewster v. Stratman*, 4 Mo. App. Rep., 41.

Where R. purchased with his own money certain mining claims, with the understanding that he would transfer the same to a company, of which he was one, which company was to own these claims, with others, which were to be worked together, it being necessary to so work them to secure water rights to make the whole valuable; and R., after securing, in his own name, claims which, if held by him in sever-

alty, would greatly injure the other claims of the company, may be required to convey to the company, on being tendered to him the money he paid for such claims: Coyote, etc., v. Ruble, 8 Oregon, 284.

B., the manager of a mine belonging to the plaintiffs, sold as agent of the plaintiffs nominally to L., but as alleged actually to L., in conjunction with B., W. & E. Subsequently a company was formed by B., L., W. & E., and also two others (Brayton and Davis), to work the mine, in which all six and others were shareholders. A bill was filed by the plaintiffs against the six and the company to set aside the sale to L.; against the first four on the ground of a fraudulent conspiracy, and against the other two as being trustees or purchasers with notice. The bill also prayed as against B. only, for the recovery of the commissions paid to him by the plaintiffs on the sale. Held, on demurrer by defendants Brayton and Davis and the company, that the bill was not multifarious, but demurrer by the defendants for want of equity allowed: *Learmouth v. Bailey*, 1 Victorian Law Rep., 34.

Defendant, who was president of a railroad company, made a contract with one C., by which the latter was to build and equip a portion of the road for a certain sum in bonds and stock, and the contract was immediately assigned to defendant with the full knowledge and approval of all the stockholders. The stock and bonds were issued, and defendant and others built and equipped the road at a less expense than the contract price. In an action to recover on account of unpaid stock, held that the stock held by defendant must be regarded as full paid-up stock. Officers of a railroad corporation have a right to enter into any agreement to build its road and pay therefor in stock or bonds, and the contractor is entitled to the proportion in stock, at its current market value at the time payment should have been made, and is not liable for the difference between that and its par value: *Van Cott v. Van Brunt*, 11 N. Y. Week. Dig., 200, Court Appeals.

The *cestui que trust* may follow trust funds so far as they can be ear-marked: *Halfey v. Tait*, 1 Victorian Law Rep. (Eq.), 8.

M. and C. were the trustees of a set-

tlement of £500 on a married woman. C., for some years, acted alone, but after his death M. made inquiries as to the money and found that it had been permitted by C. to get into the defendant's hands, and had by him been mixed with partnership moneys and employed in the business of defendant's firm. On bill by M. against defendant alone—held 1. That the members of defendant's firm were jointly and severally liable, and that his partner was not a necessary party. 2. That the representative of C., the deceased trustee, was not a necessary party. 3. That defendant having received the money with notice of the trust, might be sued in equity: *Mackay v. Caughy*, 1 Victorian Law Rep. (Eq.), 56.

Leonidas Johnson executed to Horner a deed of trust on his claim probated against the estate of Thomas Johnson, deceased, to secure a debt he owed to Coolidge, and left the claim with Horner. The deed was duly recorded. Afterward the lands of the deceased were sold by order of the probate court, and part of them were purchased by Leonidas Johnson, who paid for it by receipting the administrator for the probated claim, without the knowledge or consent of Coolidge. Afterwards Hill, Fontaine & Co. recovered judgment against Leonidas Johnson and had the land sold under execution to satisfy it, and at the sale bought the land. Held that the trust on the claim followed and attached to the land into which the claim was converted.

A purchaser at his own execution sale is not an innocent purchaser. The question of notice does not arise in such case: *Hill v. Coolidge*, 83 Ark., 621.

Where a trust fund has been by the trustee converted to his own use, if it can no longer be identified as a separate and independent fund or value, the right to follow the specific fund into the hand of the trustee's administrator is gone: *Mills v. Post*, 7 Mo. App., 519.

An attorney is precluded, from the relation which he occupies towards his client, from directly or indirectly availing himself, even after the relation has ceased, of the advantage of any fact which he learns while acting for his client: *Cameron v. Lewis*, 56 Miss., 76; *Johnson v. Ontlaw*, Id., 541.

It cannot be tolerated that an attor-

ney shall advise or encourage a client in investing in a bad title, and he himself afterwards buy up the better title and assert it as against his former client. He will not be allowed to set up his ignorance of the law or his negligence at the time of advising his client, as against the claim of his client acquired on his advice: *Gibbons v. Hoag*, 95 Ill., 47.

The purchase by the solicitor of a railroad company of its property, at a judicial sale, made pursuant to a decree in a foreclosure suit, is not of itself necessarily invalid. It will, however, be closely scrutinized, but until impeached, must stand: *Pacific, etc., v. Ketchum*, 101 U. S. Rep., 289.

L., holding P.'s note for \$3,200, agreed to accept from him three notes of C., aggregating \$2,700, in absolute payment of that amount of his note. C. was insolvent, and his notes were only valuable because they constituted a lien on a tract of land sold to him by P. The title to the land being involved, L. employed J. C. C., an attorney, to perfect the negotiation for her with P.: J. C. C. consummated the transfer of the notes and received a fee therefor. P. indorsed the notes "without recourse." J. C. C., while engaged in this business, or soon thereafter, discovered that the land which constituted the security for the notes of C. was held by the state for taxes, and that the period for redemption had expired. He communicated this information to N., his father-in-law, who purchased the land, and had the deed made to his daughter, the wife of J. C. C., and his minor son. One-half of the purchase-money was furnished by N., and the other half by J. C. C.'s wife, but was handed by him to N. Before the forfeiture to the state, C. had only a life estate in a part of the land, and the children of N. owned the reversion thereof. Upon a bill filed by L., the court rendered a decree directing the conveyance of the title held by J. C. C.'s wife and her brother to the complainant.

Held, that J. C. C.'s conduct was a breach of his professional duty to L., and cannot be taken advantage of by him or members of his family; and that the decree is correct, except as to that part of the land in which the

children of N. owned the reversion, but as to it the decree should have ordered the conveyance of the title to the life estate only: *Cameron v. Lewis*, 56 Miss., 601.

Where an attorney was employed, in 1870, to write a will, by which a certain tract of land was devised, and was consulted, in 1871, in reference to the collection of the rent of the land, he was not thereby placed in such a professional relation to the client, or to the land, as to preclude him from purchasing the land at a sale for taxes in 1872. His duty, as to the will, terminated with its preparation; and in advising as to the rent, he incurred no continuing obligation as to the land. He could not buy a title outstanding when he wrote the will, nor do anything inconsistent with his duty in regard to the matters concerning which he was consulted, nor take any advantage of information acquired in his professional employment; but he had the right to buy the paramount title arising from the sale for taxes, which was the act of the state independent of, and unaffected by, any knowledge or agency on his part: *Bowers v. Virden*, 56 Miss., 595.

An attorney holding for collection for a client choses in action, not being liens or charges upon the property of the debtor, is not precluded by his obligations to his client from purchasing the debtor's property at a judicial sale, with which his client has no connection, if the purchase be free from intentional *mala fides* on his part. And in such case the attorney is not bound to notify his client of the sale before it takes place: *Johnson v. Outlaw*, 56 Miss., 541.

Where an agent for sale has effected a binding contract for sale, but the whole of the purchase-money has not been paid, or conveyance executed, all his discretionary powers in which he would be warped by an intention to benefit himself are over; and he may become a sub-purchaser from the original purchaser, without violating the rule that an agent for sale cannot himself purchase: *Learmouth v. Bailey*, 1 Victorian Law Rep. (Eq.), 122, distinguishing *Parker v. McKenna*, L. R., 10 Chy., 96; *Learmouth v. Bailey*, 2 Victorian Law Rep. (Eq.), 229.

[10 Chancery Division, 180.]

M.R., Dec. 7, 1878.

130] **In re HULL AND COUNTY BANK.*

Practice—Company—Winding-up—Creditor—Costs of Appearance.

A creditor appearing on a winding-up petition is not entitled to his costs as a matter of right: to entitle him to them he must show a reasonable ground for appearing; and if he appears merely to ask for them, and nothing more, they will be refused.

[10 Chancery Division, 181.]

M.R., Dec. 9, 1878.

131] **In re MUTLOW'S ESTATE.*

Practice—Lands Clauses Consolidation Act, 1845, ss. 85, 87—Railway Company—Landowner—Bond—Breach of Condition—Deposit—Right to petition for Payment out.

Where a railway company, prior to entering upon lands, has made a deposit in the bank and given a bond under sect. 85 of the Lands Clauses Consolidation Act, 1845, the court has jurisdiction, under sect. 87, in the event of the non-performance of the condition of the bond, to order payment out of the deposit to the landowner on a petition presented by him for that purpose adversely to the company.

[10 Chancery Division, 186.]

M.R., Dec. 13, 1878.

136] **DEAN V. WILSON.*

[1878 D. 87.]

Practice—Sale by order of Court—Conduct of Sale—Right of any Party to advertise Sale.

When a sale has been directed by the court, and the conduct of it given to one party, no other party has a right to interfere in any way in the sale without the leave of the court.

Thus, where the court directed a sale and gave the conduct of it to an independent solicitor, both plaintiff and defendant having liberty to bid, the plaintiff was restrained by injunction from issuing and circulating advertisements that the sale was about to take place.

THIS was an action for the sale or partition of the Dunkirk Saltworks, in Cheshire, the property of the plaintiff and the defendant, who were partners. Both desiring a sale, a decree for that purpose was made on the 2d of June, 1874, the conduct of the sale being given to the plaintiff, and the defendant having liberty to bid.

Under an order of the 12th of November, 1875, made upon the application of the plaintiff, he offering to give up the

conduct of the sale, the sale was ordered to be conducted by an independent firm of solicitors in Liverpool agreed upon by the parties, the plaintiff being given liberty to bid.

The property had not yet been put up for sale, but the particulars and conditions were in course of preparation.

The plaintiff had recently, without the consent of the defendant, or the authority of the solicitors having the conduct of the sale, circulated advertisements in America notifying that the sale was about to take place, and had also circulated in Liverpool and in the neighborhood of the saltworks large printed placards announcing that the property was "to be sold by auction by order of the High Court of Chancery, due notice of which will be given," and that particulars and further information could be obtained by applying to the plaintiff or his solicitors.

The defendant applied to the plaintiff to withdraw the advertisements and placards, and, as he refused to do so, now moved *for an injunction to restrain him from printing, [137 publishing, circulating, or distributing any advertisement, placard, or other document announcing or giving notice of the sale, other than the printed particulars and conditions of sale, and such other (if any) document or documents as might be issued by or under the authority of the solicitors having the conduct of the sale.

Roxburgh, Q.C., and *C. Parke*, for the motion: What the plaintiff is doing amounts to a direct interference with the authority of the solicitors who have been intrusted by the court with the conduct of the sale, and who are therefore the only persons entitled to take the necessary steps for the purpose.

[They were stopped by the court.]

Southgate, Q.C., and *Bardswell*, for the plaintiff: Announcing a sale is not necessarily an interference with it. We have done nothing more than announce the fact, which is true, that the sale is about to take place. It has never been held, as far as we are aware, that such a proceeding is in any way irregular or improper.

JESSEL, M.R.: No proposition is clearer than this, that when a sale is directed by the court and the conduct of it given to one party, no other party has a right to interfere in the conduct of that sale without the leave of the court.

There is no more important part of the conduct of a sale than the time and method of advertising it. The price very often depends entirely upon the mode in which the sale is advertised; and it is usual, when those who have the conduct of the sale think of advertising, for them to apply to

the judge in chambers for his directions, so important is the matter considered.

In this case both parties to the cause, being partners, had liberty to bid ; and in accordance with the practice of this court—I say “of this court,” for the practice was established certainly in the time of my predecessor, and probably in the time of his predecessor—when that event happens the conduct of the sale is not given to either party, 138] but is placed in the hands of a solicitor *nominated or agreed to by both parties or by the court, and in the hands of an independent auctioneer agreed to or nominated in like manner. That has been done in the present instance. The sale has been put in the hands of most respectable and well-known solicitors in Liverpool, against whom I have not heard a word. It is perfectly intolerable that the party who has lost the conduct of the sale because he has liberty to bid, should actively interfere in the conduct of the sale by advertising the property without the leave of the court, as this plaintiff has done. He has advertised the property “to be sold by auction by order of the High Court of Chancery, due notice of which will be given”—which he has no right to do.

The fact of a property being in the market, and known to be in the market, sometimes damages a sale. However, whether it damages it or benefits it, the plaintiff in this case has no right to interfere : the consideration for the liberty to bid was his giving up the right to conduct the sale, and he has no longer any right to interfere in the conduct of it.

Nothing, in my opinion, can be plainer or less requiring authority than this—that the court is bound at the instance of the other party to restrain any such proceeding, and I restrain the plaintiff’s proceedings in this case simply upon this ground.

There will therefore be an injunction in the terms of the notice of motion, with costs.

Solicitors : *F. Venn & Son*, agents for John Quinn & Sons, Liverpool ; *Cunliffe & Beaumont*, agents for Pemberton, Sampson & James, Liverpool.

[10 Chancery Division, 189.]

V.C.B., Nov. 22, 23, 1878.

*KINNAIRD V. WEBSTER.

[139

[1878 K. 42.]

Debtor and Creditor—Principal and Surety—Current Account at Bankers—Appropriation of Payments—Guaranteed and unguaranteed Debt.

A customer borrowed from his bankers £2,000, which was placed to the credit of his current account, and to secure the debt gave them ten promissory notes payable at intervals of a week. At the same time a friend of the borrower wrote to the bankers as follows:

"You having this day at my request placed the sum of £2,000 to the credit of Mr. C.'s" (the borrower's) "account with you, in the event of his promissory notes and interest or any of them representing that amount not being paid at the due dates, I hereby undertake, upon demand, to secure payment of the same," by a mortgage of certain specified property.

On the first five due dates, the sums represented by the first five notes respectively, were debited by the bankers to the customer in the current account; and on each of the first two due dates enough cash was paid in to the account in the course of the day to liquidate the amount of the note. On the remaining three days the balance throughout the day was against the customer. The amounts of the last five notes were not entered by the bankers in the account at all. The payments in to the credit of C. to his current account and to another special account after the last note became due, were sufficient to cover all debits up to and including the last note; but the accounts were during all this time overdrawn:

Held, that the bankers were bound to apply all moneys paid in first to the notes secured by the surety which had fallen due; and that the debt was, moreover, discharged, on the principle of *Clayton's Case* (1).

TRIAL OF ACTION. On the 26th of October, 1877, Frederick Balsir Chatterton, a customer of the plaintiffs, Lord Kinnaird and others, a firm of bankers carrying on business as "Ransom, Bouverie & Co.," borrowed from them £2,000; and to secure repayment of the same and interest gave them nine promissory notes for £200 each, and one for £250, dated respectively the 7th, 14th, 21st, and 28th of January, the 4th, 11th, 18th, and 25th of February, and the 4th and 11th of March, 1878.

At the time of the advance the defendant Benjamin Webster signed and gave to the plaintiffs a letter in the following terms:—

*"London, 26th Oct., 1877. [140

"To Messrs. Ransom, Bonverie & Co.

"Gentlemen,—You having this day at my request placed the sum of £2,000 to the credit of Mr. F. B. Chatterton's account with you, in the event of his promissory notes and interest or any of them representing that amount not being paid at the due dates, I hereby undertake, upon demand,

(1) 1 Mer., 605.

to secure the payment of the same by a mortgage upon the Adelphi Theatre and other properties more particularly described in a deed of the 5th of July, 1876, of which a copy has been handed to you by Mr. F. B. Chatterton; the mortgage to be prepared in all things to your satisfaction, and at my expense.

"I am, Gentlemen,

"Your obedient servant,

"B. Webster.

"Witness, Richard Churchill."

Chatterton had two accounts with the bank, one his general account and the other a special account. Except for a short time after the loan, both accounts were constantly overdrawn, but the aggregate credits were sufficient to satisfy all liabilities up to and including the last of the notes.

On the 27th of October, 1877, the plaintiffs credited Chatterton's general account in their books with the £2,000. On the 7th and 14th of January they debited the same account with £200 to "Ransom," and on the 21st and 28th of January, and again on the 4th of February, they debited the same account with £200 as "further instalment of," or as "part payment of" the loan.

On the 7th of January the balance in the morning was over £200 in Chatterton's favor. On the 14th of January the account was in the morning against Chatterton, that is to say, it was overdrawn to the amount of £133 odd, but enough was paid in in the course of the day to liquidate the £200; and the plaintiffs admitted that according to their custom these two sums of £200 would be considered as paid.

On all the subsequent due dates, the balances both in the morning and at the close of each day were considerably against Chatterton.

In consequence of advice received by the plaintiffs, they 141] did *not enter in Chatterton's general account any of the sums due on the bills after the 4th of February.

On the 26th of March, 1878, the plaintiffs made a demand on the defendant to execute to them a mortgage for the sums owing to them on the promissory notes, which the defendant refused to do; and on the 17th of April the writ was issued.

In the statement of claim it was asserted that all the notes had fallen due, but that Chatterton had "not paid the same, or any of them, and the whole of the sums secured thereby amounting in the aggregate to the sum of £2,050, remains owing to the plaintiffs."

The plaintiffs claimed a declaration that by virtue of the agreement of the 26th of October, 1877, the plaintiffs, upon such demand being made by them upon the defendant as aforesaid, became entitled to a charge upon the Adelphi Theatre, and all other properties described in the deed of the 5th of July, 1876, for the sum of £2,050 and interest; and that the defendant might be ordered to execute a proper mortgage for that amount.

The defence stated that the defendant signed the document "for the purpose of giving to the plaintiffs security that moneys would be paid into the banking account sufficient to repay the said advance, or to meet the said promissory notes at maturity, and as guarantee for" Chatterton to this extent, and not otherwise. Further, that the plaintiffs "in fact received" from Chatterton "moneys sufficient and more than sufficient" to pay the notes at their due dates; that "both before and after the due dates" the plaintiffs had moneys of Chatterton, "which they were bound to apply in payment of the same;" that the notes were given for securing the repayment of the £2,000 advance which had long since been repaid; and that the debt which the defendant agreed to guarantee had been released and discharged.

The reply alleged, that "it was never agreed or intended that moneys paid in by" Chatterton to the account, "should be retained or applied in payment of the sums secured by the promissory notes;" that there never was any agreement or understanding that the moneys to take up the promissory notes should be paid into the account; that Chatterton never appropriated any of the moneys paid in by him to the payment of the sums secured by the *notes; and [142 that the plaintiffs were not bound to appropriate, and had not appropriated, any of such moneys to the payment of the said sums, or any of them.

The last-mentioned statements were supported by the affidavit of one of the plaintiffs, who deposed that "the moneys paid in to the said accounts were not available for payment of the advances for which the said promissory notes were given, or for paying the said notes, and it was not agreed or intended that they should be so available. Such moneys were required by the said F. B. Chatterton for the purpose of carrying on his theatrical businesses, and if the plaintiffs had impounded any of such moneys and refused to honor the said F. B. Chatterton's checks, he would doubtless have ceased to pay any moneys into the plaintiffs' bank."

In cross examination, the witness deposed that the notes

were entered in the account pursuant to custom, and that, if on any due day there had been a balance in the customer's favor, witness would have honored his check to that extent, though the £200 would have turned the balance against the customer. If at any subsequent date the account came right the money was treated as paid on the day it was entered.

Borthwick, (*Sir H. Jackson*, Q.C., with him), for the plaintiffs: The question substantially is, whether the rule in *Clayton's Case* (*) does or does not apply.

The course of dealing between the plaintiffs and defendant was well known to the defendant. He knew that the plaintiffs must honor Mr. Chatterton's checks; and to hold that it was the intention of the parties that every shilling of money paid in by Chatterton was to be impounded first to satisfy these promissory notes, would lead to an absurdity.

The rule in *Clayton's Case* is, that the debtor may appropriate his payment to either debt he chooses; failing appropriation by the debtor, the creditor may appropriate; and failing appropriation by either, the court will attribute the payment to the unpaid debt which is first in point of date. Here the customer, Mr. Chatterton, certainly made no ap-
[43] propriation. It was open then to the *plaintiffs to appropriate the payments, and they did so, by applying the moneys paid in to reduction of the balance on the general account.

Hemming, Q.C., and *W. Phipson Beale*, for the defendant: It is clear there was no agreement—only an understanding is alleged—between the plaintiffs and Chatterton as to how these moneys were to be applied; and between the plaintiffs and Webster there was not even an understanding. There having been no appropriation either by payer or payee, the rule in *Clayton's Case* (*) applies.

Independently of that, wherever, as here, there are two debts, one guaranteed, the other not guaranteed, and there is no appropriation by the debtor who pays the money, the creditor is bound to appropriate the payment first to the guaranteed debt: *Pearl v. Deacon* (*).

Moreover *Clayton's Case* applies because for this purpose the two accounts are to be treated as one. It has been held that if a bank has two branches, and a man has an account at each, one overdrawn, the other not, the bankers may combine the accounts and charge the latter account with the debt: *Garnett v. M'Kewan* (*).

Where there has been no actual appropriation, mere ignorance of the law will not exclude the operation of the

(*) 1 Mer., 605. (†) 1 De G. & J., 461. (‡) Law Rep., 8 Ex., 10; 4 Eng. R., 419.

rule: *Merriman v. Ward* (1); *Bank of Scotland v. Christie* (2); *In re Boys* (3).

Borthwick, in reply: The mere entry of the first five sums of £200 by the bankers in the general account in their own books would not be binding on Chatterton until such entry was communicated to him, *Simson v. Ingham* (4); consequently the whole debt is due; but if the court should be of opinion that the entries in the general account had the effect of extinguishing the first five debts, there still remain five other instalments of the debt clearly unsatisfied.

*BACON, V.C.: As to the first two instalments of [144 the debt, it appears that by the act of the bankers they were entered in the account, and I must assume that, with the consent of the debtor Chatterton, these sums were treated as paid. If at any time during the day on which these sums were entered in the account, sufficient cash came in to liquidate them, there can be no doubt they must be treated as paid off.

With respect to the next three instalments, there appears to have been no specific appropriation. The bankers carried the amounts into the account as debts due to them, but sufficient money did not come in to liquidate them, and evidently there was no appropriation other than the written figures in the account and in the pass-book.

The remaining five instalments were not entered in the account at all.

The real question, therefore, to be settled turns upon the written contract between the parties. Mr. Chatterton was a customer of the bank. His account required strengthening; and thereupon this agreement was come to. [His Lordship read the letter, and continued:]

That is a security given in favor of the account, and with immediate reference to the account, and the real sense and meaning of the writer of the letter is, that "if, in the course of this transaction, Chatterton pays you, the bankers, anything, you must not charge it against me."

Pearl v. Deacon (5) is a direct authority for the proposition that any payment in is to be appropriated first to the secured debt. In *Pearl v. Deacon* a tenant borrowed money of his landlord on the security of goods, and a surety joined in the obligation. The landlord exercised his common law right of distress against the goods, and it was held that he could not thereby derogate from the right of the

(1) 1 J. & H., 371.

(4) 2 B. & C., 65.

(2) 8 Cl. & F., 214, 226.

(5) 1 De G. & J., 461.

(3) Law Rep., 10 Eq., 467.

surety to the benefit of the security. By seizing the goods which were the surety's security, the landlord, to that extent, extinguished the obligation in which the surety was bound. Is not this a similar case? The surety knows there [45] is a current *account, and stipulates that if any money comes in his suretyship shall be released.

The plaintiffs' contention is that it was agreed that the notes should be treated as paid up, only in case there should be a balance in favor of the bank when the notes fell due. The amount of the notes was to be written off only against a balance. But this view is not consistent with the evidence. The evidence shows that whatever may have been the state of the account at the due dates of the notes, whenever at any date there came in enough to satisfy the notes, they were to be treated as paid off, and the liability of the surety was to be at an end.

The doctrine of appropriation, as laid down in *Clayton's Case* (1), is quite familiar. If the payer appropriates the payment, the payee must rest content with that destination of the money; if he does not appropriate the payment, the payee may do so; if neither the one nor the other appropriates, then whenever at any time sufficient comes in to liquidate prior debts, they are satisfied in order of date.

The principle of law is quite plain; the facts also are perfectly plain. I think the case fails against Mr. Webster, because the plaintiff himself has proved that at various dates after the notes fell due, there came in enough to pay the amounts, and if they are paid, the liability of the surety is at an end.

The claim fails, and the bill must be dismissed with costs.

Solicitors: *Burrows & Barnes; Webster & Graham.*

(1) 1 Mer., 605.

[10 Chancery Division, 146.]

V.C.B., Nov. 26, 1878.

*COMFORT V. BROWN.

[146

[1877 C. 396.]

Will—Construction—Ultimate Remainder, after Life Estate in S., and Estate Tail in the Children of S., “in default of issue” of S. to the “right heirs” of S. “forever”—Effect of Bequest of Leaseholds under the same Limitations.

A testator, by will made in 1820, devised and bequeathed freeholds and leaseholds together to his daughter S. for life, remainder to her first and other sons successively in tail, remainder to her daughters as tenants in common in tail, and “in case of default of issue” of S., to “the right heirs” of S. “forever.”

S. having married and died a widow, without having had a child:

Held, that she took an absolute interest in the leaseholds.

Herrick v. Franklin (1) explained.

SPECIAL CASE. John Horner, of Leytonstone, Essex, by his will, dated the 16th of October, 1820, duly executed and attested for the devise of real estate, devised certain copyhold hereditaments at Saul’s Green, Leytonstone, to his daughter Sarah Charlotte Noone for life, with remainder to trustees to preserve contingent remainders, remainder to the first and every other son of the body of the said Sarah Charlotte Noone successively in tail, and in default of such issue, to the use of all and every the daughters of the said Sarah Charlotte Noone as tenants in common in tail; and in default of such issue, “unto the right heirs of the said Sarah Charlotte Noone forever.”

Testator then bequeathed a leasehold house and premises known as the Coach and Horses public house, at Mile End, Middlesex, three freehold cottages, and two acres of freehold land, to his daughter Sophia Horner and her assigns for life, without impeachment of waste, free from the control, debts, or engagements of any husband she might marry, remainder to the trustees before named to preserve contingent remainders, and after the decease of his said daughter Sophia Horner he gave and devised the said cottages, land, and public-house in the following terms:—

*“In like manner and under and subject to the like [147 limitations unto or for the benefit of the sons and daughters of the said Sophia Horner, and their respective issue as are hereinbefore expressed, mentioned, and declared as to the devise of my said copyhold messuage or tenement at Saul’s Green aforesaid, and in case of default of issue of my said daughter Sophia Horner, I give and devise the same cot-

(1) Law Rep., 6 Eq., 593, 596.

tages, lands, and public house to the right heirs of the said Sophia Horner forever."

The testator died on the 2d of May, 1822, and the will was proved in the course of the same month.

Sophia Horner married Walter Leigh Levy, who died in 1855. There were no children of the marriage.

Sophia Levy died on the 9th of February, 1875, having by will dated the 10th of February, 1870, devised and bequeathed the above-mentioned three freehold cottages and two acres of freehold land, and also the above-mentioned leasehold public house and premises, and all other her freehold, copyhold, and leasehold estates, and all her personal estate, to her nephew Walter Horner Brown, upon trust to sell and convert, and out of the mixed fund to pay her debts, funeral and testamentary expenses and legacies, and then to pay one-sixth of the residue to her nephew William Henshaw Comfort, and to retain the remaining five-sixths for his, Walter Horner Brown's, own use.

Mrs. Levy's heir-at-law was Thomas Horner.

The case was stated for the opinion of the court by William Henshaw Comfort as plaintiff, against Walter Horner Brown, the executor, and Thomas Horner, the heir-at-law, submitting the following questions:—

1. Whether, under the will of John Horner, Sophia Levy took such an interest in the leasehold property at Mile End thereby devised and bequeathed as she could devise or bequeath by will?

2. Who in the event of the said Sophia Levy not taking such interest as aforesaid became entitled to the said leasehold property on her decease?

3. How and out of what property the costs of this case ought to be paid?

148] **Sir H. Jackson*, Q.C., and *Freeling*, for the plaintiff: Mrs. Levy took a devisable interest in these leaseholds.

Where there is a devise of leaseholds "for such estate and estates, and in such manner and form" as the real estates have been given—and the gift of the real estates is to A. for life, remainder to trustees to preserve, remainder to the heirs of the body of A.—A. takes an absolute interest in the leaseholds: *Brouncker v. Bagot* ('). So that had there been in this case no devise of the leaseholds in case of default of issue of Sophia, she would have taken an absolute interest.

Then what is the effect of the gift over? There were no

children of the marriage; hence, according to *Evers v. Challis* (¹), it was a contingent remainder, not an executory devise, and hence would enlarge the preceding estate to an absolute interest.

Mackeson, Q.C., and *Phear*, for the first defendants: On behalf of the executor we claim the leaseholds as part of Mrs. Levy's estate.

By the testator's will these landholds are blended with certain freeholds, and the freeholds are devised to Sophia for life, remainder to her sons successively in tail, remainder to her daughters as tenants in common in tail, and in default of such issue to the right heirs of Sophia. As to the freeholds, this devise has been held to be an ultimate contingent remainder to Sophia in fee. Now, as to leaseholds, it has often been held that what gives an inheritance in fee or in tail in freeholds, whether the words be "heirs of the body" or "heirs," will give an absolute interest in leaseholds: *Roper on Legacies* (²), cited in *Williams v. Lewis* (³). This view is supported by *Gittings v. McDermott* (⁴), referred to with approval by Lord St. Leonards in *De Beauvoir v. De Beauvoir* (⁵). When the word "issue" is used, some modification of the rule has been admitted: *Ex parte Wynch* (⁶).

Another well-established rule is, that words importing a failure of issue, even without the word "such," refer to the class or classes of issue before mentioned: *Jarman* [149 on Wills (⁷); *Lewis on Perpetuities* (⁸); *Theobald on Wills* (⁹); *Evers v. Challis* (¹⁰); *Baker v. Tucker* (¹¹); *Smyth v. Power* (¹²); *Foster v. Hayes* (¹³).

Swanston, Q.C., and *Chester*, for the second defendant: The heir-at-law of Mrs. Levy takes as *persona designata*. The cases cited no doubt show that where there is a blended gift, and in the freeholds an estate tail is taken by virtue of the rule in *Shelley's Case* (¹⁴), there, in leaseholds, an absolute interest will be taken by the same words; but it is different where the estate taken in the freeholds is an estate in fee. In *Herrick v. Franklin* (¹⁵), Vice-Chancellor Giffard said, "I cannot assent to such a proposition of law as that where real and personal estate are blended, the personalty

(¹) 7 H. L. C., 531.

(²) Ed. of 1847, p. 1522.

(³) 6 H. L. C., 1013, 1020.

(⁴) 2 My. & K., 69, 79.

(⁵) 3 H. L. C., 524, 557.

(⁶) 5 D. M. & G., 188.

(⁷) 3d ed., vol. ii, 434, 457.

(⁸) Page 281.

(⁹) Page 387.

(¹⁰) 7 H. L. C., 531.

(¹¹) 3 H. L. C., 106.

(¹²) 1r. L. Rep., 10 Eq., 192.

(¹³) 2 E. & B., 27; 4 E. & B., 717.

(¹⁴) 1 Rep., 219.

(¹⁵) Law Rep., 6 Eq., 593, 596.

goes as the realty. Such a proposition is, I think, bad law, and authority is the other way. There is no authority for holding that because the rule in *Shelley's Case* applies to real estate, it is to be applied to personal estate also." So that by these words a life estate only is given to Sophia Horner.

Then, to whom is the property given after the death without issue of Sophia Horner? To the "right heirs" of Sophia "forever." The word heir cannot be divided, hence the devisee is the heir-at-law: *De Beauvoir v. De Beauvoir* (1); *Theobald on Wills* (2); *Haslewood v. Green* (3); *Hamilton v. Mills* (4); *In re Gamboa's Trusts* (5).

The cases cited on the other side are all distinguishable. The rule is thus stated, "If real estate be combined with personalty in a gift to 'heirs,' the difficulty noticed by Lord Eldon of giving different meanings to the same words in the same place, affords a strong ground for construing the word 'heirs' in its natural sense, as to both species of property:" [50] *Jarman on Wills* (6); *Southgate v. *Clinch* (7); *Mounsey v. Blamire* (8); *Gwynne v. Muddock* (9); *Boyd v. Gollightly* (10); *Theobald on Wills* (11).

Mackeson, in reply: The remarks of Vice-Chancellor Giffard in *Herrick v. Franklin* (12) cannot have been intended to abrogate the general rule that what constitutes an estate of inheritance in freeholds gives an absolute interest in leaseholds.

Almost all the cases cited on the other side were upon the construction of the word "heirs" of the testator, not "heirs" of the tenant for life.

BACON, V.C.: I have listened to the arguments in this case with all the interest which their ingenuity deserves, but I cannot say that I entertain any doubt about the answer which ought to be given to the first and important question raised upon the special case.

Mr. Swanston, in the course of his argument, said that any layman reading this will would not entertain much doubt about its meaning. What does that amount to? It means this, that a man, with ordinary perception, acquainted with a knowledge of the language used, would on reading this will be able to tell what the testator meant.

(1) 3 H. L. C., 524.

(2) Page 225.

(3) 28 Beav., 1.

(4) 29 Beav., 198.

(5) 4 K. & J., 756.

(6) 8d ed., vol. ii, p. 78.

(7) 27 L. J. (Ch.), 651; 4 Jur. (N.S.), 428.

(8) 4 Russ., 384.

(9) 14 Ves., 488.

(10) 14 Sim., 327.

(11) Page 167.

(12) Law Rep., 6 Eq., 593, 596.

The universal rule of construction is that you are to give effect to the intention of the testator. The whole argument which has been addressed to me has been in order to show that there are some technical rules which forbid the court from applying that wholesome common sense rule to the construction of this will.

Now let us consider what the will is. A man having to provide for his two daughters leaves to one daughter certain copyhold property for her life, with limitations over in tail, and then, subject to those limitations and upon their failure, he gives the property "unto the right heirs" of the daughter "forever." Then besides, having to deal with another portion of his property, some of it *being [15] freehold and some of it leasehold, he blends (a word which I do not use without intending to give to it its full signification) the properties together—that is to say, he makes them one subject of bequest, and he gives them in like manner to his other daughter, Sophia Horner. The same provision is made for each daughter, and in each instance in case of the provisions which he had made for the issue of his daughter failing, then he gives to each of his daughters what? In the plainest words, he gives the most absolute unqualified interest in the property to the two several subjects of his devise.

The cases are, no doubt, extremely numerous upon the subject, but there is no case which does not establish the rule that you may apply the rule in *Shelley's Case* (¹) to a gift of personalty—that although the rule is drawn from principles of feudal law, it is no less applicable to gifts of personalty. If that is the rule, then here there is a plain gift of personal estate mixed up and blended with real estate, but which is to go in that blended condition according to the direction of the testator and to the persons upon whom he has bestowed it. It has not been argued on the other side that there is any serious doubt about the application of the rule in *Shelley's Case* as to the real estate, but it is said that there is no instance in which the same rule has been applied to personal estate. *De Beauvoir v. De Beauvoir* (²) and *Gittings v. McDermott* (³) are instances; and there are hundreds of other instances in which the same rule has been applied in the same manner to personal estate. But it is said that there was a case of *Herrick v. Franklin* (⁴), before the late Lord Justice Giffard, when Vice-Chancellor, in which a contrary decision was come to. No one can hear

(¹) 1 Rep., 219.

(²) 2 My. & K., 69.

(³) 3 H. L. C., 524.

(⁴) Law Rep., 6 Eq., 593.

the name of Lord Justice Giffard mentioned without feeling the utmost respect for any decision of his. No one can doubt his profound knowledge of the law; but I do not think he has decided anything of the kind. The question arising there between real estate and personal estate, the personal estate being given for life clogged with and bound by a trust to apply a portion of it to the maintenance of a lunatic brother—the Vice-Chancellor in effect said: "It is not [52] the time *for me to decide that matter. I will not decide that, because these two things are blended together, these legatees are not at liberty to sell and dispose of the estate which is burdened with this trust. Hereafter when the time comes there may be a question between the persons who lay claim to this bequest, whether it goes to the next of kin or not."

The claim which Mr. Swanston has argued for on behalf of the heir-at-law of Mrs. Levy is as if he was entitled under the terms of the will. The case seems to me to be perfectly clear. All the cases referred to recognize and establish the rule that there is no difference between real and personal estate in the construction of such a will as this. The object of this testator, plainly expressed in plain words, was, that his daughter Sophia should have for her life the whole enjoyment of this blended property, and that the property at her death was to go to her children with the limitations mentioned. He then provides for the event of the death or default of issue, and says that if his property should not go in that direction, then he gives it to Sophia absolutely out and out. The question raised upon this special case is, "whether under the will of John Horner the said Sophia Levy took such an interest in the leasehold property at Mile End thereby devised and bequeathed as she could devise or bequeath by will." I can entertain no kind of doubt, not reading it merely as a layman, but reading it with reference to all the authorities which have been cited to me, that Mrs. Levy had an absolute power over this property, blended as it was, and that she has exercised that power by her will.

The first question must be answered in the affirmative; and that being so, it becomes unnecessary to answer the second question. The costs will be paid out of Mrs. Levy's estate.

Solicitors: *Heather & Sons.*

[10 Chancery Division, 153.]

V.C.B., Dec. 5, 1878.

*BRYANT V. BULL.

[153]

[1877 B. 499.]

BULL V. BRYANT.

[1877 B. 513.]

*Practice—Sequestration—Receiver in lieu of Sequestration—Judicature Act, 1873,
s. 25, sub. 8.*

Plaintiff in action, which had been followed by a cross-action, obtained an order in both actions that his costs of the cross-action should be paid by the defendant in the action, a married woman, entitled for life, for her separate use, to the dividends of a sum of stock, standing in the names of trustees, who were not parties to either action. Plaintiff had endeavored to obtain a sequestration, but failed from not being able to find the defendant's address so as to serve the subpoena for costs. He then moved the court for a receiver, under sect. 25, sub. 8 of the Judicature Act, 1873. After service of the notice of motion, but before the motion was heard, the defendant made an affidavit, in which her address was set forth:

Held, that the principle of *Anglo-Italian Bank v. Davies* (1) applied, and that the plaintiff was entitled to a receiver; and order made on the hearing of the motion accordingly.

MOTION on behalf of Thomas Bryant, the plaintiff in the first action, that he, or some other fit and proper person, might be appointed to receive the dividends due and accruing due on £5,106 0s. 2d. Consols and £5,000 New Three per Cent. Annuities, standing in the names of Charles Bull and William Benjamin Paterson, as trustees of the will of the late George Bull, deceased, to which dividends the defendant Jane Emma Bull, widow, was entitled for her life under the said will, until the amount due to Bryant under a judgment recovered by him against Mrs. Bull, dated the 25th day of March, 1878, with interest, and his costs consequent on the judgment and of the present application should have been fully paid and satisfied; or in the alternative, for a writ of sequestration on production of an affidavit of service on Mrs. Bull.

The action and cross-action had been tried, and by the judgment referred to in the notice of motion, which was in both the actions, Mrs. Bull was directed to pay to Bryant his taxed costs of the *second of the actions. The [154 costs had been taxed, and appeared by the certificate, dated the 3d of June, 1878, to be £46 5s. 2d.

Applications for payment having failed, a subpoena was on the 13th of June issued for the costs.

(1) 9 Ch. D., 275; *ante*, 103.

Bryant's solicitor said he had caused every endeavor to be made to serve Mrs. Bull, but that she could not be found, and that the Record and Writ Clerk refused to issue the sequestration without production of an affidavit of service of the subpœna.

The notice of motion was dated the 16th of November, 1878, and was served immediately afterwards. The motion was made on the 21st of November, and was ordered or arranged to stand over until the 28th of November.

Meanwhile, namely, on the 27th of November, Mrs. Bull filed an affidavit, describing herself as of an address in London. In this affidavit she said that since the date of the judgment she was residing in Brighton, and that since the 25th of April, 1878, she had resided in London; that her residence had always been known to her solicitors; that she had not evaded service of any process, neither was she aware until the notice of motion was served that a subpœna for costs had been issued.

The affidavit then proceeded to set forth certain charging orders on the fund.

Sir H. Jackson, Q.C., and *Owen*, for the motion: The motion is made under sect. 25, sub-sect. 8, of the Judicature Act, 1873, and on authority of the *Anglo-Italian Bank v. Davies* (¹). The only difference is this, when the notice of motion was served we could not get the fruits of the judgment, because we did not know the respondent's address. True, we know it now, and the question is whether this knowledge, acquired since the notice of motion was served, debars us from this remedy.

Byrne, for the respondent Mrs. Bull: The motion is misconceived. The first action is still pending; in the second no subpœna for costs has been served upon the respondent.

The real question is whether the *Anglo-Italian Bank v. 155 Davies*, *applies. There an action had been brought; the appointment of a receiver was the only remedy the plaintiff had; and all proper parties were before the court. Here the plaintiff is moving in the absence of the trustees, and of the persons holding the charging orders. The motion is not made, as in the authority cited, in an action instituted for the purpose of having a receiver appointed. The plaintiff is departing from the regular and proper mode of procedure. He might have obtained a garnishee order under Order XLV, rule 3. That is one remedy; or he might have sued out a writ of sequestration, with leave of the court to

(¹) 9 Ch. D., 275; *ante*, 103.

serve by substitution ; or he might have obtained a charging order.

BACON, V.C.: It has been said that this application is irregular. I do not see any irregularity in it.

A rule respecting debts due to the debtor from third persons has been referred to. But there is no garnishee here; there is no attempt here to attach any debt due from a third person. Nor is the thing sought to be attached the subject of suit between these parties; so that the case of a garnishee, that is to say, of a third person who owes money to the debtor, and whose debt is liable to be attached, does not arise.

It has been said that the application is novel. But after reading the report of the decision in the *Anglo-Italian Bank v. Davies* (¹), I cannot say, although the facts in the particular instance may be novel, that there is any novelty in the principle of the application. The terms of the statute are beyond all doubt, and the comments of the Lords Justices as to the meaning of the statute show clearly what was meant. From these judgments it appears that the Judicature Act confirms, and in some sense expands, the remedies of a judgment creditor. They show that in a case where the remedy of the creditor was defective, it was the intention of the Legislature to supply that defect. The case may have some features of novelty; but I do not think it is novel in principle, nor that it is marked by any kind of irregularity. The appointment of a receiver is a matter which does not *concern mortgagees or prior incumbrancers, for a receiver in the exercise of his authority will be obliged to respect former orders of the court; and the prior incumbrancers will be at liberty to take such proceedings on behalf of their own interests as they may think fit, so that that circumstance occasions no kind of difficulty.

The contention amounts to this—that this lady, being a debtor under a judgment of the court for the payment of costs, is to retain her interest in this fund, and leave the applicant unpaid. But that is what the law does not permit.

Then it was said that there is a suit regularly constituted, in which proceedings for the recovery might be had, according to the established practice of the court, possibly either by sequestration, attachment, or a charging order.

It is true there is such a suit, but the sequestration could not be enforced because the defendant could not be found. There may be other remedies, there may be 500 or 5,000

(¹) 9 Ch. D., 275; *ante*, 108.

other remedies, but if this one remedy which the applicant has invoked be one of them, there is no reason why he should not have recourse to this one out of the 5,000.

The defendant says she had no intention of evading service. She says that her address was always known to her solicitors. But it is not the less true that applications made to her solicitors were made in vain. She says she had been residing for some time in Brighton, and afterwards in London. But Brighton is a large place; and London is a still larger place, and she does not satisfy the court by saying that she had been living first in one, and then in another of these places, without saying where.

I think the application is one that ought to be granted. There must be a reference to chambers to appoint a receiver, such appointment to be subject and without prejudice to the prior orders of the court.

The plaintiff's costs of this application will be added to the former sum ordered to be paid.

Solicitors: *Harper, Broad & Battcock; Paterson, Snow & Bloxam.*

[10 Chancery Division, 157.]

V.C.H., Nov. 18, 19, 1878.

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*ANCONA V. WADDELL.

[1875 A. 87.]

Will—Forfeiture Clause—Bankruptcy in Testatrix's Life—Administration Suit—Annulment.

Testatrix, who died in February, 1875, by her will in February, 1874, bequeathed the residue of her property to trustees to pay the residue of the income in fourths to her sons and granddaughters for life, and there was a clause of forfeiture in case either of the sons or granddaughters should become insolvent or be declared bankrupt.

W. (a son) was adjudicated bankrupt in June, 1878. The testatrix was a creditor, and proved in the bankruptcy. In March, 1875, W. offered a composition, and it was accepted by the creditors, but the arrangement could not at that time be carried into effect. The trustees under the will filed a bill in July, 1875, for the administration of the trusts, and the usual decree was made in July, 1876. In May, 1878, the composition was agreed upon and approved by the court in June following, and an order was made for the annulment of the bankruptcy. On further consideration of the cause:

Held, that, upon the principle laid down in *White v. Chitty* (1) and *Lloyd v. Lloyd* (2), and in *In re Parnham's Trusts* (3), there was not a forfeiture.

CAROLINE MITTLAND, who died on the 5th of February, 1875, by her will, dated the 13th of February, 1874, gave the residue of her real and personal estate to two executors,

(1) Law Rep., 1 Eq., 372.

(2) Law Rep., 2 Eq., 722.

(3) Law Rep., 18 Eq., 418; 2 Eng. R., 357.

their heirs, executors, administrators, and assigns, upon trust that they or the survivor of them should convert the same into money, and invest the whole of her estate in the securities as in the will mentioned. Upon trust, in the first place, out of the income to pay an annuity of £50 to her sister, and as to the residue of the income, to pay one-fourth to her son Robert Maitland during his life; one-fourth to her son Thomas during his life; one-fourth to her son William, the defendant, during his life, and in case his wife Jeannie Dillon, a defendant, should be living at the time of his death, to pay one-half part of the said one-fourth to her so long as she should remain his widow; and the remaining fourth to her two granddaughters, children of her son Robert, equally, during their joint lives, from the time when they should attain the age of *twenty-one [158 years or be married under that age, for their separate use. The will contained a proviso that if any of the persons entitled under the trusts therein declared to any part of the income of the trust estate, other than the sister, should become insolvent or be declared bankrupt, or should assign, charge, or incur, or attempt or affect to assign, charge, or incur, other than by any settlement made by the granddaughters on their marriage, his or her share of the income of the trust estate or any part thereof, or should, otherwise than as aforesaid, do or suffer anything whereby the same or any part thereof would through his or her act or default, or by operation or process of law, or otherwise, if belonging absolutely to him or her, become vested in or payable to some other person or persons, then and thenceforward his or her interest in the share of the income should absolutely cease, determine, and be forfeited, and go as thereafter provided, as well with respect to the original share of the said income thereinbefore limited to him or her during his or her life, as also to any share or shares of such income which might then have accrued, or might but for that clause thereafter accrue under any provision contained in the will: Provided, also, that nothing therein contained should affect the original share of her son William in the income of her trust estate so as to deprive his wife of the interest thereinbefore given to her in the events aforesaid in one-half of his original fourth share, which one-half share should, in case of forfeiture under the proviso thereinbefore mentioned, in case the wife of William should be living, be paid to her during her life or widowhood. There were trusts in favor of the survivors of the sons and grand-

daughters whose shares of income should not have become forfeited, and in favor of grandchildren, of the principal moneys. The will empowered the trustees to compound and allow time for the payment of debts due to the testatrix, and to settle all accounts on such terms as they should think expedient, and to refer matters in difference to arbitration, and to postpone the conversion of her estate, and to manage the property.

The testatrix left all the legatees surviving.

On the 7th of December, 1872, a petition in bankruptcy was presented against William Maitland, and after various adjournments he was, on the 9th of June, 1873, adjudicated [59] bankrupt. *He prepared a statement of his affairs, and therein he included the testatrix as a creditor, and she, on the 27th of June, 1873, proved against the estate for the balance due to her, and, by proxy, voted at meetings of creditors held before and after the date of her will, for the appointment of trustees.

On the 4th of March, 1875, William Maitland called a meeting of his creditors, and he made to them a proposal to pay a composition, and it was accepted by the statutory majority, but the proposed arrangement was not carried out in consequence of formal difficulties through a particular creditor delaying to file his account in obedience to an order of the court. In consequence of the various claims made through the bankruptcy of William Maitland, the trustees under the will, on the 14th of July, 1875, filed this bill for the administration of the trusts by the court, and a decree for that purpose was made in July, 1876.

In May, 1878, the trustee in bankruptcy and creditors agreed to a composition, which was approved by the Court of Bankruptcy, and on the 20th of June, 1878, an order was made for the annulment of the bankruptcy.

The cause came into the paper to be heard upon further consideration at the commencement of the Michaelmas Sittings, but was ordered to stand over, all parties not being ready, and before it came into the paper again a certificate of the annulment of the bankruptcy had been obtained from the proper officer, and the question which arose was whether William Maitland's share had become forfeited by his bankruptcy. In consequence of the snit by the trustees, no payment in respect of the share could be made to any one.

Dickinson, Q.C., and *Cracknall*, for the plaintiffs, stated the facts of the case, and pointed out that the words in the

will were, "should become insolvent or be declared bankrupt, or should assign," referred to the fact that at the date of the will William Maitland had already been adjudicated bankrupt, and said the question was whether the language used would justify the court in holding that there had been a forfeiture, the testatrix herself being aware of the bankruptcy.

**Hastings*, Q.C., and *George Henderson*, for the [160 defendants, the first being the trustee in bankruptcy, who disclaimed any interest: The clause of forfeiture has not taken effect, and looking at the whole of the cases upon the subject, and the doctrine which has been established in *White v. Chitty* (¹), *Lloyd v. Lloyd* (²), and *Smallcombe v. Olivier* (³), it is clear that the effect of annulling the bankruptcy is to render the state of things the same as if the bankruptcy had never occurred. In *Trappes v. Meredith* (⁴) Vice-Chancellor James (⁵) said in effect that the decisions had proceeded upon one broad principle that the general intent of a gift of this kind was "the personal enjoyment of the legatee," and if that could not be had by reason of the property being vested in any other person the forfeiture took effect, but otherwise it did not. The gift in this case is a share of income of residue, and there possibly might not have been any, at any rate it had to be ascertained by the trustees, and in the administration by the court; and long before anything became payable the bankruptcy was annulled, consequently taking the adjudication and the annulment together, the result is, as Vice-Chancellor James observes in that case (⁶), that the whole matter "is restored to the state in which it was at the time of the adjudication. It is true that *Trappes v. Meredith* was, on appeal, reversed (⁷); but Lord Hatherley (⁸) approved of the decisions in *Manning v. Chambers* (⁹) and *Seymour v. Lucas* (¹⁰), and said "that words of futurity in a gift of this description are not to operate so as to defeat the manifest intention of the testator that the gift shall be a personal benefit to the legatee." This case is governed by the authorities which have been referred to, and therefore it is submitted that there has been no forfeiture by the bankruptcy.

T. L. Wilkinson appeared for the other sons of the testatrix, and did not oppose their brother's claim.

**MacSwinney*, for the two granddaughters—in- [161

(¹) Law Rep., 1 Eq., 372.

(²) Ibid, 2 Eq., 722.

(³) 13 M. & W., 77.

(⁴) Law Rep., 9 Eq., 229.

(⁵) Ibid, 9 Eq., 232.

(⁶) Law Rep., 9 Eq., 233.

(⁷) Ibid, 7 Ch., 248; 2 Eng. R., 264.

(⁸) Law Rep., 7 Ch., 252.

(⁹) 1 De G. & Sm., 282.

(¹⁰) 1 Dr. & Sm., 177.

fants—not parties, but who had been required to appear on the hearing: This case is governed by the decision in *In re Parnham's Trusts* (*), where the cases of *White v. Chitty* (**) and *Lloyd v. Lloyd* (**) were distinguished. The test is, has the time come when a payment can be made to a free man? and it is impossible to say here that a time did not come within the period of four years which has elapsed since the testatrix's death when the trustees could have paid this income to somebody. The reason why no income has been paid is because of the administration by the court at the instance of those who could have paid the money. But that cannot alter the rights of the parties. There having been a time when William Maitland was not a free man, and payment could not be made to him, the annulment now relied upon, the certificate of which has been obtained at the last moment, cannot prevent a forfeiture. This view is supported by the cases of *Trappes v. Meredith* (**) and *Cox v. Fonblanque* (*).

Hastings, in reply.

HALL, V.C.: I have looked into the cases and considered the question which was argued yesterday, and it appears to me that, applying the principles which are laid down in the cases of *White v. Chitty* and *Lloyd v. Lloyd*, and in *In re Parnham's Trusts*, this is not a case in which there has been a forfeiture. I do not consider that the decisions in the case of *Trappes v. Meredith*, which was before Vice-Chancellor James, and was reversed, and *Cox v. Fonblanque*, which were relied upon for the granddaughters, are at variance with my view. I do not consider that the principle laid down in *In re Parnham's Trusts* is at variance with that view: the decision in that case depended upon the particular circumstances of the case. Vice-Chancellor Wood, in *Lloyd v. Lloyd*, said, referring to the decisions in which language of futurity had been held to embrace cases of actual bankruptcy at the time of the execution of [62] *the instrument, or between that time and the death of the testator (*), "The reason why, in some cases to which I have been referred, the court has rather strained the language so as to occasion forfeiture, has been to prevent the property passing into hands other than those which the testator intended should receive it." In like manner, the court will endeavor to interpret the language in favor of the lega-

(1) Law Rep., 18 Eq., 413; 2 Eng. R., 357.

(2) Law Rep., 1 Eq., 372.

(3) Law Rep., 2 Eq., 722.

(4) Law Rep., 7 Ch., 248; 2 Eng. R., 264.

(5) Law Rep., 6 Eq., 482.

(6) Law Rep., 2 Eq., 724.

tee, so as to effectuate what it is manifest the testatrix would have done under existing circumstances.

Of course my observations and my judgment have application only to a case like the present, which is one of residue of income, and where the bankruptcy was annulled (as I consider it was, though the certificate of annulment was not drawn up) within a reasonable time after the death of the testatrix, that is to say, within five months, and before, as I consider, it could be said that there was any actual income of the share which could be treated as payable to, or retained for or appropriated for the benefit of this residuary legatee.

Solicitors: *Watkins, Baker & Co.; Stopher & Rundle; J. P. Woulfe.*

[10 Chancery Division, 166.]

V.C.H., Dec. 21, 1878.

**In re OWEN.*

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Tenant for Life of Freeholds—Reversionary Interest—Production of Cestui que Vie by Party in Possession—6 Anne, c. 18.

Where an application is made under the statute 6 Anne, c. 18, s. 1, to the party in possession of an estate for the production of a *cestui que vie* to the person entitled to the estate in remainder, and the party in possession does not respond to the application, the applicant is entitled to an order for production.

MARY ANCHORS, who died in February, 1835, by her will made in 1834 devised a freehold estate, situate in Denbighshire, to trustees to the use of her grandson Edward Owen for life, with remainders to his sons in tail, and to his daughters as tenants in common in tail.

Edward Owen had two children (sons); one died in infancy, and the other in 1872, unmarried, intestate, and without having barred his estate tail.

In 1838 Edward Owen sold his life interest to John Hayward, and he shortly afterwards sold or mortgaged it to Miss Downes, who upon the bankruptcy of Hayward entered into, and was now in possession.

In 1853 Edward Owen was convicted of forgery, and was transported to Van Dieman's Land. The devisees in remainder in tail *executed deeds for the purpose of [167 barring the entail, and sold their interests in the estate to a purchaser. This was an application by the purchaser of the remainder that the purchaser of the life interest do produce the *cestui que vie*. The application being made under

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the statute 6 Anne, c. 18, s. 1. The applicant, who had caused inquiries to be made for Edward Owen in Hobart Town, Tasmania, had failed in tracing him after the year 1855, and believing that he was dead, he, on the 6th of December, 1878, gave notice to the solicitors of the party now in possession of the estate, in pursuance of the above statute, to produce the *cestui que vie* within fourteen days from the date of the notice, but they had failed to do so. The solicitors accepted service of the notice to produce on behalf of their client, and informed the purchaser that their client held a policy of life assurance upon the life of Edward Owen; that they had had no information of him since the year 1855; and that they had applied to the office in which the policy was effected for payment of the sum assured thereby.

Cozens-Hardy, in moving for an order that the party in possession do produce Edward Owen, pointed out that the affidavit of the purchaser of the estate did not contain any express statement that he had cause to believe that Edward Owen's death was concealed by Miss Downes, and submitted whether the affidavit was sufficient without an express statement to that effect. He referred to the cases of *Ex parte St. Aubyn* (*), *Ex parte Grant* (*), *In re Lingen* (*), *In re Clossey* (*), *In re Dennis* (*), and *Re St. John's Hospital, Cirencester*, before Vice-Chancellor Sir J. Stuart on the 11th of January, 1868 (*).

HALL, V.C.: Having regard to the way in which the statute 6 Anne, c. 18, s. 1, has been construed, and to the cases which have been referred to, and also to the orders which have been made by the court under the statute, I [68] hold that where it appears by an applicant's affidavit (as it does here) that an application has been made to the person being and claiming title to be in possession in respect of the life estate by the person entitled to the estate in remainder for the production of the *cestui que vie*, and the person so in possession and applied to does not respond to the application, the applicant is, under the statute, entitled to an order for production under it. I therefore make an order for production in the common form.

Solicitors: *Dean & Taylor*, agents for Minshalls & Parry-Jones, Oswestry.

(*) 2 Cox, 373.

(*) 6 Ves., 512.

(*) 12 Sim., 104.

(*) 2 Sm. & Giff., 46.

(*) 7 Jur. (N.S.), 230.

(*) Reg. Lib., 1868, B. 183; and see 16 W. R., 556.

C.A.

Curteis v. Wormald.

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See 1 R. S., N. Y., 749, § 6, 1 Edm. St., 700; Woodf. Landlord and Tenant (11th ed.), 8.

Where a lease contained a clause that the landlord might, *after reasonable search and inquiry* for the person upon whose life the lease depended, give notice to the tenant that he had made it, and require the tenant to pro-

duce such person before a judge of the county court; it was held that what was a reasonable search was a mixed question of law and fact, to be determined upon the particular circumstances of each case: *Clarke v. Cummings*, 5 Barb., 839.

See *McCarty v. Camel*, 1 Barb. Chy., 455.

[10 Chancery Division, 169.]

C.J.B., July 29, 1878.

**Ex parte* LITHGOW. *In re* FENTON. [169

Execution against Trader—Liquidation Petition—Injunction to restrain Sale—Debt above £50—Possession Money—Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), s. 87.

In determining whether the amount for which an execution is to be levied exceeds £50, possession money may be taken into account even after an injunction has been granted restraining the sheriff from selling the goods.

[10 Chancery Division, 172.]

M.R., March 30: C.A., Dec. 20, 1878.

*CURTEIS V. WORMALD. [172

[1875 C. 107.]

Conversion—Money directed to be laid out in Land—Intestacy—Real or Personal Estate.

Where personal estate is bequeathed upon trusts for conversion into land to be held on trusts which ultimately fail, land purchased before the failure of the trusts goes to the next of kin as real estate.

Reynolds v. Godlee (1) overruled.

THE testator, George Gent, died in 1818, having by his will devised his real estates in settlement, limiting life estates to several persons, with remainders to their sons successively in tail male, and the ultimate reversion in fee to a relation who died in the testator's lifetime. By a codicil he, on the death of the devisee of the reversion, substituted another devisee; but by a seventh codicil revoked this substituted devise, and by an eleventh codicil directed that "the remainder of the fee simple of all my landed estates shall go in such way as the law may direct." He directed his trustees, whom he also appointed his executors, to lay out his residuary personal estate in the purchase of freehold and copyhold estates to be settled to the same uses.

All the tenants for life survived the testator and died with-

(1) Joh., 536, 582.

out issue, and on the death of the survivor of them in 1870, all the dispositions of the real estate came to an end.

The next of kin of the testator at his death were Edward Walker and Benjamin Walker. Edward Walker died in 1820, and Benjamin Walker in 1827. The testator's debts and funeral expenses and legacies were all paid, and at various times, beginning in 1821 and ending in 1870, considerable sums forming part of the testator's residuary estate were invested in the purchase of freehold and copyhold estates. The freeholds so purchased were for the most part, if not entirely, conveyed to the uses declared by the will and codicils concerning the devised estates. The copyholds were surrendered to the trustees on corresponding trusts. The last of these purchases was completed after the death of the [173] *last tenant for life, but the contract had been entered into before his death.

Edward Walker devised his real estates to his son George Walker absolutely. Benjamin Walker died intestate as to his residuary real estate, leaving George Walker his heir-at-law. George Walker devised all his real estate to the plaintiff E. Walker and the defendant Robert Walker upon trusts. The plaintiff E. Walker and the defendant Robert Walker were thus the real representatives both of Edward Walker and of Benjamin Walker, and they were also the personal representatives of Edward Walker. The personal representative of Benjamin Walker was Jeremiah Curteis, the other plaintiff. The plaintiff E. Walker was the heir-at-law of both Edward Walker and Benjamin Walker.

By an order made on the 13th of November, 1876, it was declared that, according to the true construction of the will and codicils of the testator, and in the events which had happened, he had died intestate as to the corpus of his residuary personal estate, and that his next of kin, according to the Statutes of Distribution, living at his death, were entitled to such corpus.

A summons was now taken out by the plaintiff E. Walker, asking for a declaration that the corpus of the residuary personal estate, to which the next of kin were declared by the order of the 13th of November, 1876, to be entitled, devolved as real estate. The summons was heard before the Master of the Rolls on the 3d of March, 1878.

Davey, Q.C., and *Romer*, for the plaintiff E. Walker: We submit that the testator's next of kin took the undisposed of interest in the purchased real estates in the character of real estate, and, accordingly, that on the deaths of the

next of kin it became transmissible as real estate, and not as personal estate. It is clear that the effect of this direction to lay out personal estate in the purchase of land was to effect a conversion into real estate; and it is also clear that the undisposed of interest in the lands purchased resulted to the testator's next of kin, and not to the heir, *Cogan v. Stephens* ('); for a conversion under a will is not an absolute conversion, but only a conversion so far as is necessary for the *purposes of the will: *Wright v. Wright* ('). [174 But the question now is, whether the next of kin take this undisposed of interest as personal estate or as real estate; and upon that we submit that a conversion, being for the purposes of the will only, does not affect the rights of persons who take independently of the will. The only authority against that view is *Reynolds v. Godlee* ('), but we submit that that decision is opposed to all principle, and should not be followed.

[JESSEL, M.R.: That is a very unsatisfactory decision, and I cannot follow it.]

Chitty, Q.C., and *Murray*, for the legal personal representatives of Benjamin Walker, relied on *Reynolds v. Godlee*, and submitted that inasmuch as that was a decision nearly twenty years old it ought not now to be overruled.

Bagshawe, Q.C., and *Snape*, for the defendant Robert Walker.

JESSEL, M.R.: The point which I have to consider and to decide is this: A testator directed his trustees—for although the same persons may have been appointed executors they are for this purpose trustees, and trustees only—to lay out his residuary personal estate in the purchase of real estate, freeholds and copyholds, to be settled to certain uses, comprising a long series of limitations. The residue was ascertained, that is, the testator's debts and legacies and funeral and testamentary expenses were all paid, and then the residue was at different times laid out by the trustees, pursuant to the will, in the purchase of freehold and copyhold estates, which were conveyed so as to vest the legal estate in the trustees.

That being so, the limitations took effect to a certain extent, and then, by reason of failure of issue of the tenants for life, the ultimate limitations failed, and there became a trust for somebody. Now, for whom?

According to the doctrine of the Court of Equity, settled, if I may say so, by the well-known case of *Ackroyd v. Smith-*

(') 5 L. J. (Ch.), 17.

(') 16 Ves., 188.

(') Joh., 536, 582.

[175] *son* (')—*for it has always been the law of this court since—this kind of conversion is a conversion for the purposes of the will, and does not affect the rights of the persons who take by law independent of the will. If, therefore, there is a trust to sell real estate for the purposes of the will, and the trust takes effect, and there is an ultimate beneficial interest undisposed of, that undisposed of interest goes to the heir. If, on the other hand, it is a conversion of personal estate into real estate, and there is an ultimate limitation which fails of taking effect, the interest which fails results for the benefit of the persons entitled to the personal estate, that is, the persons who take under the Statutes of Distribution as next of kin. Their right to the residue of the personal estate is a statutory right independent of the will.

The result is that in the case I put there is a trust for the next of kin. How any one could imagine it was a trust for anybody else it is difficult to understand; and had I not been referred to the judgment of a very eminent judge on this subject I should have said it was impossible to understand it.

There certainly is authority for saying—a single authority, and an authority standing alone—that the ultimate trust is not for the next of kin, but for the executors. Why? The executors have ceased to have anything whatever to do with the matter. They have paid over the legacy to the legatee, who happens to be a legatee-trustee, and who holds it by law, under the Statutes of Distribution, as trustee for the next of kin, and no one else. By what process of reasoning any other result can be arrived at I have been unable to discover. The decision to which I have referred is one which, to my mind, is utterly opposed to the whole law upon the subject.

Then the next question which arises is, how does the heir-at-law in the first case, or the next of kin in the second, take the undisposed of interest? The answer is, he takes it as he finds it. If the heir-at-law becomes entitled to it in the shape of personal estate, and dies, there is no equitable reconversion as between his real and personal representative, and consequently his executor takes it as part of his personal estate.

On the other hand, if the next of kin, having become entitled [176] titled *to a freehold estate, dies, there is no equity to change the freehold estate into anything else on his death; it will go to the devisee of real estate, or to his heir-at-law if he

(¹) 1 Bro. C. C., 503.

has not devised it, and will pass as real estate. As to that, there is no question, no doubt, no difficulty. No one has suggested any other principle, and even in the case cited—*Reynolds v. Godlee* ⁽¹⁾—it was admitted that that was the principle, and the only point of difference or distinction suggested was that which appears to me to be opposed to the whole law on this subject, namely, that there was an ultimate trust for the executors, and not for the next of kin.

As that does not seem to me to have any foundation, and as it appears to me to be opposed to both principle and authority, I do not consider myself bound to follow that decision, and I may say that I am very glad to find I can invoke the very same judgment of the very same judge for the purpose of showing that I am not bound to follow it; for, being referred to a decision of another judge—the Master of the Rolls—given several years before, he said that that decision was not obligatory upon him; but that as he thought it consonant with sense and reason, and sound law, he chose to follow it. Unfortunately I do not entertain the same view as regards this authority, and therefore I am unable to follow it.

A declaration was accordingly made “that all the real estate bought or contracted to be bought before the death of the last tenant for life passed to Edward Walker and Benjamin Walker, the next of kin of the said testator, as real estate in equal moieties, and that George Walker became entitled to one of such moieties as the devisee of the said Edward Walker, and to the other moiety as the heir-at-law of the said Benjamin Walker at his (Benjamin Walker’s) death, and that both of such moieties passed to the devisees of the real estates under the will of the said George Walker.

The legal personal representative of Benjamin Walker appeared. The appeal was heard on the 20th of December.

**Chitty*, Q.C., *Ince*, Q.C., and *G. Murray*, for the [177 appellants: Until the decision of Lord Cottenham in *Cogan v. Stephens* ⁽²⁾, it was not settled that the next of kin were entitled to an undisposed of interest in real estate directed by a will to be purchased with personal estate of the testator. That is not now in dispute, but the question remains whether the next of kin take it as personalty or in its actual state. In *Reynolds v. Godlee* ⁽³⁾, which is the only direct

⁽¹⁾ *Joh.*, 536, 582. ⁽²⁾ 5 H. L. J. (Ch.), 17; *Lewin on Trusts*, 3d ed., App. vii.

⁽³⁾ *Joh.*, 536.

1878

Curteis v. Wormald.

C.A.

authority on the point, it was decided that the undisposed of interest reverts to the executors, who must apply it as personal estate, and that the analogy of an undisposed of interest in real estate directed to be sold does not apply, but the property must continue to be treated as personalty. *Cogan v. Stephens* to some extent supports the same view.

Davey, Q.C., and *Romer*, for the plaintiff Edward Walker, and *Bagshawe*, Q.C., and *Snape*, for the defendant Robert Walker, were not called upon.

JAMES, L.J.: I have no doubt as to the proper decision to be arrived at in this case. With all deference to the judgment of Lord Hatherley, it is impossible, I think, to arrive at any other conclusion than that at which the Master of the Rolls has arrived. It was settled by *Cogan v. Stephens* that what was the right rule as between the real and personal estate where land was directed to be sold, was also the right rule as between the two estates in the case where money was directed to be laid out in the purchase of land, that is to say, if the purpose for which that land was required failed, the undisposed of interest went back to the persons entitled to the personal estate. It has been urged that this means that it goes back to the executors to be dealt with as personal estate. But where there is no trust remaining to be performed, and the executors have entirely discharged themselves from every executorial duty, it is absurd to say that the undisposed of interest in the personal estate is to go back to them upon trust for the persons entitled *to the personal estate; it goes directly to the persons beneficially entitled, that is to say, to the next of kin, just as the undisposed of proceeds of the sale of real estate go to the heir-at-law. And therefore the same principle applies in both cases, which is this, that where you trace property into a man there is no equity between his different classes of representatives as to altering the position in which that property is. If it is money arising from the sale of land it remains money, that is to say, the heir-at-law of the person who has become beneficially entitled to it as heir-at-law has no right to have it reconverted into land. If it is land purchased under a direction to invest in land, the persons interested in the personal estate of the persons who have become entitled to it as next of kin have no right to have it reconverted into money. This property came to the next of kin in the shape of real estate, and their personal representatives have no equity to have it converted, but it must go to the heirs or devisees of the next of kin ac-

cording as they died intestate or testate. The decision of the Master of the Rolls must be affirmed.

BAGGALLAY, L.J.: I entirely assent, and for the same reasons.

THESIGER, L.J.: I am of the same opinion.

Solicitors: *Ewbank & Partington; G. L. P. Eyre & Co.*

See 23 Eng. Rep., 148 note.

A devise of the proceeds of lands, when sold, which is absolute and exclusive, with no provision whereby any other person should in any event have any right or interest therein, and subject only to a life estate in the widow of the devisor, is held to be in legal effect a devise of the remainder in fee. Under such a devise, where the bare power of sale is given to the executors

merely to sell the lands and distribute the proceeds, all the devisees collectively may, before the power of sale is executed, elect to take the lands instead of the proceeds according to their respective interests in the latter, and thus prevent a sale, and each of them may ordinarily so elect as to his own share: *Mandlebaum v. McDonell*, 29 Mich., 78, 86.

[10 Chancery Division, 179.]

C.J.B., Aug. 8, 1878. C.A., Jan. 16, 1879.

**Ex parte* JARVIS. *In re* SPANTON. [179]

Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), s. 28—Annuling Adjudication—Subsequent Discovery of concealed Property of Bankrupt—Discharge of annulling Order—Rights of Creditors.

One of the creditors of a bankrupt held two bills of sale of his chattels. Objections had been raised by the trustee to the validity and extent of the security, though no steps had been taken to set it aside. Ultimately, the mortgagee offered to pay £620 to the trustee. A meeting of the creditors was held, under sect. 28 of the Bankruptcy Act, 1869, when it was resolved to accept the mortgagee's offer; that the bankruptcy should be thereupon annulled; and that the mortgagee should release his claim on the bankrupt's estate, and the bills of sale should not be disputed by the trustee. The resolutions were approved by the court, and, upon the trustee certifying that the terms of them had been completed to his satisfaction, an order was made annulling the bankruptcy. The £620 was divided among the creditors other than the mortgagee. The mortgagee realized his security, but did not obtain enough to pay his debt in full. Six years afterwards it was discovered that the bankrupt had concealed a reversionary interest to which he was entitled at the date of his adjudication, and an order was obtained discharging the annulling order, and directing that the bankruptcy should proceed as if that order had not been made. The trustee then received the reversionary interest, which had fallen into possession:

Held (reversing the decision of Bacon, C.J.), that the mortgagee, equally with the other creditors, was remitted to his original rights, and was entitled to prove for the unpaid balance of his debt.

[10 Chancery Division, 183.]

C.A., Jan. 23, 1879.

183] **Ex parte* CAHEN. *In re* CAHEN.

Liquidation Petition—Lunatic—Next Friend—Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), ss. 65, 125—Bankruptcy Rules, 1870, rr. 7, 252—Bankruptcy Forms, 1870, No. 106.

A liquidation petition cannot be signed by a next friend on behalf of a lunatic not so found by inquisition.

Semble, that, in the case of a lunatic so found by inquisition, the Court of Lunacy might have jurisdiction to direct that a liquidation petition should be signed on his behalf.

H. J. CAHEN and C. Cahen were partners in trade. On the 10th of January, 1879, C. Cahen, having become insane, was by the direction of his medical attendant placed in a lunatic asylum. Shortly afterwards H. J. Cahen filed a separate liquidation petition. A joint petition on behalf of the partners was prepared, and was signed by H. J. Cahen on behalf of himself, and also as next friend on behalf of the lunatic. C. Cahen had not been found a lunatic by inquisition. The Registrar refused to receive the joint petition, and his decision was affirmed by Mr. Registrar Brongham, acting as Chief Judge. There was evidence that a judgment for £200 had been recovered against the firm, and that the judgment creditor was in a position to issue execution against the joint assets.

T. N. Hilbery, for H. J. Cahen, now applied *ex parte* for a direction to the Registrar to file the joint petition: Unless a joint petition is filed, or a joint act of bankruptcy committed in some other way, the joint assets cannot be protected from executions in respect of joint debts. They may be all swept away by a few creditors, who will thus obtain payment in full. This will be an injury to the other joint creditors, and also to both the partners, who will not be able to obtain a discharge from the joint debts, even if the joint assets might be sufficient to pay 10s. in the pound.

[BRAMWELL, L.J.: An execution above £50 levied by seizure and sale would be an act of bankruptcy, of which the other creditors might take advantage: Bankruptcy Act, 1869, ss. 6, 87.]

184] *There might be no creditors whose debts became due before the expiration of fourteen days from the sale. A lunatic not so found by inquisition could sue by a next friend in the Court of Chancery for a dissolution of partnership, and sect. 65 gives the Court of Bankruptcy all the powers and jurisdiction of the Court of Chancery.

[JAMES, L.J.: A lunatic cannot by himself or by a next friend commit a voluntary act of bankruptcy. In a liquidation petition the debtor has to state that he is unable to pay his debts.]

Form No. 106 of the Bankruptcy Rules, 1870, contains such a statement, but the use of that form is required only by rule 252. The act does not require it. And rule 7 shows that the prescribed forms may be deviated from in a proper case. In *Anon.* (1) it was held that lunacy was no defence to a commission of bankruptcy; and in *Ex parte May* (2), where a bankrupt was lunatic, though not so found by inquisition, another person on his behalf was allowed to make the affidavit required by 6 Geo. 4, c. 16, s. 122, to be made by the bankrupt, that his certificate and the consent of his creditors to his discharge had been obtained without fraud.

[JAMES, L.J.: It is very desirable that what is asked should be done, but the Legislature has made no provision for such a case. Without some statutory provision it seems to me utterly impossible that any man should be able to say for a lunatic that he is unable to pay his debts, and that he desires to have his affairs liquidated. Possibly, if he had been found a lunatic by inquisition, the Court of Lunacy might think that this course would be for his interest, and might be able to act on his behalf. But the Court of Bankruptcy has no such jurisdiction, and I think the Registrar was quite right in refusing the application.

BAGGALLAY and BRAMWELL, L.JJ., concurred.

Solicitors: *F. W. & H. Hilbery.*

(1) 13 Ves., 590.

(2) 2 M. D. & D., 381.

[10 Chancery Division, 185.]

V.C.B., July 11, 1877. C.A., Nov. 15, 16, 19, 22; Dec. 2, 1878.

*THOMAS V. ATHERTON.

[185

[1871 T. 115.]

Partnership—Loss arising from Negligence of Partner—Arbitration—Assent of Partners to Submission.

T., the managing partner of a colliery, received notice from L., an adjoining owner, that the workings were being carried on beyond the boundary. T. insisted that he was entitled to the disputed ground, and carried on his workings. An action was then commenced against him by L., and was referred to arbitration. T.'s partners were not informed of these proceedings till after the reference to arbitration had been agreed to. They did not object to it, but treated it as a proceeding in which they were interested, and were present before the arbitrator. The arbitrator awarded that there had been a trespass, and assessed the damages at £8,000. The partners refusing to contribute, T. filed his bill to compel them to do so. The defendants set up the case that T. had wilfully and knowingly worked beyond the

boundary. Bacon, V.C., considered that he had not worked beyond his boundary at all, but held him not entitled to contribution, on the ground that he had no authority to refer the dispute to arbitration without the assent of his partners, and that their subsequent assent was given in ignorance of material facts, and was not a sufficient ratification.

On appeal, the court was of opinion that the arbitration had been assented to, so as to make the arbitrator's award binding on the copartners as to the fact of trespass and the *quantum* of damages, but, being of opinion that the plaintiff, although he had not knowingly trespassed, had worked beyond the limits of the partnership colliery without proper inquiry as to the limits, and had acted with gross negligence and recklessness in continuing his workings after notice, and without consulting his partners, when it was evident that his right to work in the disputed area was extremely doubtful, and the profits to be expected from so doing very small:

Held, that the decision that the other partners were not liable to contribute ought to be affirmed:

Held, also, that as no additional costs had been occasioned by the allegation that the plaintiff had wilfully and knowingly trespassed, the plaintiff could not be relieved from any part of the costs on the ground of the failure of that allegation.

THIS was a suit for contribution by the managing partner of certain coal workings in the Forest of Dean against his copartners in respect of damages awarded by reason of a trespass on the coal property of an adjoining proprietor.

Adjoining the copartnership workings was a colliery called the Hopewell Colliery, and adjoining that was a colliery [186] called the *Thatch or Independent Colliery belonging to Mrs. Loxley. These collieries were formed under what are called "gales" in the Forest of Dean. The coal mines in the Forest of Dean belong to the Crown, subject to customary rights of remote antiquity in certain persons called "free miners," to take, and hold, and work portions of the coal-field. Two of those portions were the Hopewell and Thatch collieries, which were and had been in existence at the time of and long previously to the passing of the Dean Forest Mines Act, 1838 (1 & 2 Vict. c. 43). That act was passed for, amongst other purposes, the objects mentioned in the 24th and 26th sections of the act, and which may be briefly stated thus: The commissioners were to ascertain who the persons were who were entitled to any existing gales, or any estate or interest therein, and were to cause a plan or plans to be made upon which the situation of the gales was to be delineated, and were to make a schedule or description of the gales to accompany the plans. All persons interested, or claiming to be interested, in any gale were to send in claims in manner therein mentioned, and in default of so doing were to be barred from all right to any such gale, and all benefit or interest therein.

By their award, dated the 8th of March, 1841, the commissioners awarded the Thatch or Independent Colliery to certain persons under whom Lucy Loxley derived title thereto. And they awarded the Hopewell Colliery to cer-

tain persons under whom Peter Teague and others derived title. Teague and some, but not all, of his co-owners formed a working partnership under the name of Peter Teague & Co. The plaintiff Thomas was a co-owner to the extent of one-twelfth, but was not a member of the firm of Peter Teague & Co. Peter Teague & Co. worked that colliery, and other coal properties similarly situated, under an understanding with their co-owners, as follows, viz., the coal was considered as worth so much royalty, and Peter Teague & Co. divided the royalties on the workings between themselves and their co-owners. Peter Teague & Co., being then owners of the greater part of the colliery, and permitted on that understanding to work the shares of the others, in the year 1859 entered into an agreement with the plaintiff's firm of Trotter Thomas & Co., as follows:—

“Memorandum of an agreement entered into the 22d day of *February, 1859, between Trotter Thomas & Co. of [187 the one part, and Peter Teague & Co. of the other part. Trotter Thomas & Co. agree to take and work the unworked coal in Hopewell, in Wimberry Colliery, on the east and west of the ridge in Hopewell Bottom in the north-eastern direction, and cut on the eastern side of the ridge a new deep level according to the terms of the award, working the coal on each side of the ridge in a workmanlike manner, rendering and paying to Peter Teague & Co., the proprietors of the colliery, sixpence per ton for all large coal sold and threepence per ton for all small or lime coal sold. They also agree to pay all poor-rates and the Crown royalty of twopence per ton.

“Peter Teague & Co. hereby agree to let to the said Trotter Thomas & Co. the above award of coal upon the terms above mentioned, and, in addition, to allow the use of the plates now laid in the roads of the level now in work, excepting 100 yards which are required for the Bush Pit.

“Should Trotter Thomas & Co. wish to give up the said colliery at any time, they shall be at liberty to do so by giving three months' notice to Peter Teague & Co., and leaving the then workings open and free to Peter Teague & Co. without demanding any compensation for opening the levels or pits. All castings, &c., laid down by the said Trotter Thomas & Co. may be reserved by them if not taken to at a valuation at the close of the term by Peter Teague & Co.’

Under that agreement Trotter Thomas & Co. worked the Hopewell Colliery, and in so doing worked into what Mrs. Loxley claimed as part of the Thatch or Independent Col-

liery. The plaintiff Thomas was the managing partner, and had the sole superintendence of its operations.

The plans annexed to the award of the commissioners showed this disputed spot as part of the Thatch Colliery. It was contended on the part of the plaintiff that the inaccuracy of the plans was notorious in the district, and that the letterpress which accompanied them explained them, and showed that the spot in question lay within the limits of the Hopewell Colliery. Vice-Chancellor Bacon considered that this was established, but the Court of Appeal did not agree with his Lordship's conclusion.

188] *Long prior to this an agreement dated the 27th of October, 1802, had been entered into between James Teague the elder and several other persons, who were at that time co-owners with him of the Thatch Colliery, which was in substance an agreement for a partition of the colliery. Under this agreement a certain part of the colliery was to belong to James Teague the elder in severalty, but, as it appeared, under another contemporaneous agreement Isaiah Birt was to have one third share of it. Both James Teague the elder and Isaiah Birt were dead at the time when the commissioners under the act investigated the titles to the mines, and no claim on behalf of the persons claiming under their wills was carried in, and the whole of the Thatch Colliery was awarded to the persons who, under the agreement of 1802, were entitled to the other parts thereof. In 1864, the plaintiff having carried the workings on behalf of the partnership into the disputed area, Mrs. Loxley gave a formal notice to the plaintiff and Peter Teague that they were trespassing, and required an account of coal gotten, and called on them to desist from encroaching on the Thatch Colliery. The plaintiff and Teague thereupon consulted counsel, and were advised that possibly they might be able to establish that the persons under whom Mrs. Loxley derived title were by the agreement of 1802 made trustees for James Teague the elder and Isaiah Birt of that part of the colliery which was agreed to be given up to them, and which was stated to include the area now in dispute. The plaintiff and Peter Teague were the persons principally interested in such right, if any, as could be established in this way, and a bill was prepared on their behalf to enforce this equitable title, but no proceedings were actually taken. The plaintiff returned to the notice an answer claiming title to the disputed mines under the agreement of 1802, and alleging that possession had ever since been had according to this agreement. Upon the receipt of the notice Teague and Thomas also served on Mrs. Loxley

a counter-notice by which they claimed to be "owners" of the coal in the disputed area, and warned her not to trespass upon it.

In November, 1869, Mrs. Loxley commenced an action against the plaintiff and Peter Teague for trespass on her colliery. On the 12th of August, 1870, by an agreement in writing between Mrs. Loxley of the one part and the plaintiff and Teague of the other part, the matters in difference were referred to arbitration. The agreement recited that Mrs. Loxley claimed to be the owner in fee of the Thatch Pit Colliery, and that "the said John Trotter Thomas and Peter Teague for themselves and others claim to have been and to be entitled at law or in equity to certain parts of the said colliery, and to work or get the coal which may have been or may be found or got from within a certain area or certain limits thereof. And whereas the said L. Loxley alleges that large quantities of coal have been wrongfully worked and gotten by the said J. T. Thomas and P. Teague from within the area or limits of the said colliery so as aforesaid claimed by them, and in parts of the said colliery beyond such limits or area, and they also allege that large quantities of coal have been wrongfully worked or gotten by the said L. Loxley from within the said area or limits, and disputes and differences have arisen between the said L. Loxley and the said J. T. Thomas and P. Teague in respect thereof, and in respect of the right, title, and claim of either party to have worked and gotten and to work and get the coal lying within the said area and limits, the said L. Loxley contending that the whole of the coal within such limits belongs absolutely to her, and the said J. T. Thomas and P. Teague claiming to have been and to be entitled on behalf of themselves and others, either at law or in equity, to work and get the coal within the said area and limits." The agreement then recited the action and the contemplated suit in equity. The other partners in the firm of Trotter Thomas & Co. were not informed of the action or of the reference to arbitration until the 11th of December, 1870, when the plaintiff wrote a letter to Nathan Atherton, one of the partners: "There is an action coming off in a matter between Mrs. Loxley of the Independent Colliery and the Hopewell Colliery Company. We are only implicated as tenants, and the whole concern is not worth the lawyer's expenses. Of course we are right, as all expenses we may be put to will come out of the royalty. I shall have to run up to London on Monday evening the 2d of January, and must return on Tuesday after giving my evidence. I have

kept the royalty in hand by permission of Messrs. Teague & Co. to secure our expenses. I have now about £40 in hand." Atherton communicated the facts to the Crowdys, [190] the other partners. The proceedings *under the reference commenced on the 1st of February, 1871, and Atherton and a solicitor on behalf of the Crowdys attended to watch, and made no objection to the reference. The arbitrator, on the 25th of July, 1871, by his award determined the boundary line between the two collieries, and awarded that P. Teague and the plaintiff should pay Mrs. Loxley £6,000 as damages for the coal gotten beyond the boundary line.

The plaintiff's partners in the firm of Trotter Thomas & Co. denying their liability to contribute towards payment of this sum, the plaintiff in November, 1871, filed his bill in this suit against them, praying that the partnership might be dissolved and wound up, and that it might be declared that the £6,000 and the share of the costs of Mrs. Loxley awarded to be paid by the plaintiff and Teague to Mrs. Loxley, and the plaintiff's costs of the action, reference, and award, or so much thereof respectively as was or might be payable by the plaintiff, constituted a debt of the partnership, and that the partners might contribute ratably along with the plaintiff.

Several of the defendants by their answers raised the contention that the plaintiff had knowingly and wilfully worked beyond the boundaries of the colliery.

The action was tried before Vice-Chancellor Bacon on the 11th of July, 1878.

Benjamin, Q.C., and *J. G. Wood*, for the plaintiff.

Kay, Q.C., *Sir H. Jackson*, Q.C., and *Stirling*, for the other partners; and

Whitehorne, for the representatives of a deceased partner.

BACON, V.C.: The main point which I have to decide is whether under that award which was made in July, 1871, the defendants, who were the plaintiff's partners in the trade carried on by them, are liable to contribute according to their proportionate interest in the partnership. It cannot, I think, be disputed that the authority of a partner to refer to arbitration cannot be exercised without the consent and knowledge of his partners. I agree, also, that there *may be such conduct on the part of the other partners as would imply or supply the deficiency of any express authority. What my attention has been particularly directed to is what took place between August, 1869, and the termination of the proceedings in July, 1871—viz., whether what took place

in that interval, with the knowledge of this fact, does supply the acquiescence which would be necessary to complete the authority of Thomas, the plaintiff, to enter into the arbitration. Referring to the evidence, it is not disputed that the agreement to refer was entered into by Thomas without any communication with his partners, without any explanation to them of the nature of the reference that he proposed to submit, and it was not until in his letter of the 11th of December, 1870, that he announced the fact of the arbitration having been agreed on to Atherton. It was upon that intimation, and there was no other explanation than that which was in that letter, that Atherton came to attend the arbitration. What took place before the arbitrator is left in some obscurity. The only witnesses, as I gather, examined before the arbitrator on behalf of the plaintiff were the plaintiff and his son, and I gather from the evidence also given in this case that Mr. Huxham was examined on behalf of Mrs. Loxley.

[His Lordship, after referring to the facts, said that he could not hold that there had been such an acquiescence on the subject of the arbitration as that it imposed any liability, whatever might be its results, upon the defendants in that suit. If the case had only to be decided as far as he had at present tried it, he should be bound to say there was no case on which the defendants, as partners in the firm of Trotter Thomas & Co., could be held liable to pay any of the money awarded against Thomas and Teague, but it was by no means upon that point only that this case was to be decided, for he thought it was clear upon the evidence—written evidence, not the opinion of parties, but upon plain written evidence which was clear—that there never was any question referred to arbitration in which the partnership *quâ* partnership had a particle of interest. Not only were they nowhere named in it, but in every one of the letters, and upon the other written evidence which existed in the case, it was clear that they were entirely out of sight. Nothing could be clearer, in his judgment, than that the *dispute which existed between Mrs. Loxley and [192 Teague and Thomas was confined entirely to her, on the one side, and those two persons on the other, together with the persons who were co-owners with them of the mine.

It was under these circumstances that in August, 1870, the agreement to refer was entered into. The agreement to refer showed distinctly what were the limits of the reference, what were the subjects to be submitted to the judgment of the arbitrator, and it cannot be said that there was

any question affecting the firm of Trotter Thomas & Co. excepting the questions which were raised there between the parties who, according to their own statement, were competent to raise it. His Lordship stated the recitals in the agreement of reference, and continued :]

Can it be said after that, that any question had been raised between Mrs. Loxley and the firm of John Trotter Thomas & Co.? Is it possible to give any other meaning or signification to those recitals which state the subject of the reference, than that Teague and Thomas, owners of the mine, were insisting not only upon their rights by way of defence against Mrs. Loxley, but were asserting that they had rights against her in respect of trespass committed by her upon the land of which they claimed to be the owners? Then it was agreed that it should be referred to determine "all questions of law and equity as to whether the said John Trotter Thomas and Peter Teague were and are entitled to work and get the coal within any part of the area aforesaid, and if so, to fix the limits," if they should establish their rights. That was the state of things when the agreement of 1870 was entered into, or in December, 1870, when the letter which I have referred to was written, which announces to Mr. Atherton the pendency of the arbitration. The arbitration goes on, and in the result the arbitrator finds there is no foundation for the claim of Thomas and Teague against Mrs. Loxley, and he finds the damage which Mrs. Loxley has sustained by the workings within the area which was in dispute, amounted to the sum of £6,000. I cannot find upon that evidence that there were any questions submitted to the arbitrator in which Trotter Thomas & Co. were in any degree interested. The agreement of 1859 is clear and explicit in its terms. There is no reason to doubt [193] that Teague & Co., the commercial firm, had *taken upon themselves to act as owners, not, as it is said, without the knowledge of Thomas, but they undertook to let to Trotter Thomas & Co. the mines which are within the disputed area—the east and west sides of the ridge.

I think I cannot, upon such evidence as is before me, adopt that part of the defendant's construction of the agreement of 1859, which seeks to show that Thomas, being co-owner of one-twelfth of the Hopewell Colliery, and therefore entitled to the benefit of the agreement of 1802, although he was acting two parts—for if Teague & Co. represented all the owners, then he was represented by Teague & Co., and if they were only a commercial trading company having the benefit of the agreement by which some assignment was

made to them, then his character as the manager of Trotter Thomas & Co. was perfectly distinct—I say I cannot adopt the argument which has been addressed to me, founded upon the common law cases, that Thomas did enter into a warranty, and that warranty not having been fulfilled he has come under the liability which the defendants avail themselves of. But upon the other point, even if the acquiescence had been more clearly proved than I think it has been upon examining what was the subject of the reference, who were the parties to the reference, and what was the thing to be determined in the reference, I am forced to the conclusion that the partnership had nothing whatever to do with it, and that their presence, or such presence as they did afford to the proceedings under the award, does not at all fix upon them that liability which is sought to be fixed upon them. I wish that I could have done with the case there, because up to that point I desire to pronounce my decision without any kind of hesitation whatever. I have endeavored to show the ground for my decision, that it was an arbitration which did not concern Trotter Thomas & Co., and no presence of theirs could make them liable for what was done under it. But in that case, if that is the only question, and I believe it is, submitted for my decision, a quantity of subjects wholly unnecessary and unimportant if the defendants are not bound by the award, have been introduced. They have, therefore, a plain legal defence; they had no doubt about that. They have not only imputed to Mr. Thomas dishonest intentions *and dis- [194] honest practices, for which there is not a particle of foundation, but these gentlemen who in their own person and by their predecessors go back for fifty years in a trade which has been carried on profitably, this mining partnership, find it right, now that this matter has become the subject of a quarrel between them, to impeach Mr. Thomas's conduct in a manner which I think is wholly unjustifiable. I can discover nothing in the conduct of Mr. Thomas in his cross-examination or in his affidavits which would warrant such an imputation. I think he has properly discharged the duty which by common consent the defendants vested in him and placed upon him, and that he has done the best that could be done for the partnership in which he was interested. But what excuse is there for the defendants having raised the question upon the commissioners' award? What is it to them what the commissioners' award is? The arbitration has ended—the award has been made; nobody can set aside that award, and nobody can properly canvass,

criticise, or impugn it—I cannot, for I have no means of knowing what evidence was before the arbitrator, except, as I have already said, there was upon the one side the plaintiff and his son, and upon the other side the evidence of one surveyor, if not two, who has made an affidavit in this matter. The mistake the plaintiff has made, in my opinion, is that which is very often made, and fatally made. He has undervalued his opponent; he thought that Mrs. Loxley's case could be pooh-pooh'd, that there was no foundation for it, and relied upon his reading of the commissioners' award. I can only say, if I had to deal with it as a matter from the beginning, reading the commissioners' award, reading the description of a ridge of coals, and a tract of coal which is granted in the Hopewell Colliery, and the tract of coals which is granted in the Thatch or Independent Colliery, and finding that it is distinctly prescribed that the Thatch or Independent boundary is to be that level line, and they are to keep to the west of it, I should not entertain any doubt that the boundaries, as Mr. Thomas believed them to exist, were the true boundaries. My doubts would not be removed by the evidence of Mr. Huxham. Mr. Huxham, a gentleman from Swansea, is brought to lay down the law in the Forest of Dean, where laws of [195] very great antiquity, *of great peculiarity and nicety, prevail; where the question of boundaries can only be decided by persons acquainted with the customs of the place, knowing the surface and underground working, being competent to translate into plain English those ambiguous or mysterious expressions which are found in the commissioners' award about "in the land," and "the old workings"—most critical expressions, because upon the true interpretation of them depend the rights of the parties in this case. Mr. Huxham is brought here, and the defendants have brought up the model which Mr. Huxham made, in which he treated the ridge of coals, which he gave no description of in the commissioners' award except that it is a ridge of coal, as a thing having a backbone or an apex, so that a line could be drawn from north to south, as if it were a thing in existence; he has made a map which is annexed to the award, it seems, for which there is not the slightest foundation or reason, so far as I can find in the evidence. I say so because all this evidence has been thrust upon me by the defendants for consideration. Giving to it the best consideration I can, I say it proves the plaintiff's case, it proves that there has been no trespass, and, but for this unfortunate award, it would be vain for Mrs. Loxley,

or any one else, to say that, looking at the words of the award, and attending to the evidence of a man who points out where the old workings are made by a certain James Teague many years ago, a fixed boundary is easily ascertained. In my judgment there is no ground for saying that any trespass has been committed. It is much too late to bring that forward as a subject for decision; but I cannot properly pass by it without saying what I have said. But upon the question of the costs of this suit it has a very great bearing. How can the defendants thrust upon Mr. Thomas, who come here to ask that they may contribute, the charge that he has committed the trespass, when the question as between him and Mrs. Loxley was decided by the award of the commissioners? For what possible reason or useful end could all that evidence have been gone into? I am unable to furnish an answer to that question. It did not concern the defendants in the slightest degree, the award has to do with the plaintiff. It does not concern them at all. But for some reason, which I can ascribe *only to the unfortunate quarrel which had taken [196 place between the parties, they think it right by producing models, by filing affidavits and examining witnesses, to try and get out of the thing which was in dispute between the parties, and to fix upon the plaintiff the costs of that part of the case to which they would be entitled generally in the costs of the suit. There can be no order for costs of the suit as far as it is a partnership. The plaintiff is liable, in my judgment, to pay to the defendants the costs of so much of the suit as claims contribution under the award. They are entitled to no other costs, and no other costs ought to be included in the taxation.

So much of the bill as seeks to charge the defendants with contribution to the sum awarded by the arbitrator will be dismissed with costs, and no other costs.

The plaintiff appealed. The appeal came on for hearing on the 15th of November.

Benjamin, Q.C., and *J. G. Wood*, for the appellant: The case made by the defendants, that the plaintiff knowingly trespassed on coal to which he knew that he had no right, is completely disproved. The case of fraud therefore fails, and even if the decision of the Vice-Chancellor is affirmed in other respects, we ought to receive the costs of so much of the suit as relates to the question of fraud. The plaintiff acted perfectly *bona fide*, and the action was brought against him in his character of partner. The other

partners when they knew of the arbitration acquiesced in it in the most decided way, and are therefore bound by the result. The amount which the plaintiff may be called upon to pay ought therefore to be treated as a partnership debt.

Kay, Q.C., *Sir H. Jackson*, Q.C., and *Stirling*, for the other partners: The plaintiff, with the most ordinary care, might have ascertained that he was committing a manifest trespass. He was, therefore, guilty, at all events, of gross negligence, especially in going on after Mrs. Loxley's notice [97] without consulting his partners. *A loss arising from such conduct must be borne by the partner who causes it: *Lindley on Partnership*(¹); *Bury v. Allen*(²); *Campbell v. Campbell*(³).

Benjamin, in reply.

Dec. 2. The judgment of the Court (James, Baggallay, and Thesiger, L.JJ.) was now delivered by

JAMES, L.J.: This is a suit for contribution by the managing partner or co-owner of certain coal workings against his copartners or co-owners in respect of damages awarded by reason of a trespass on the coal property of an adjoining proprietor.

An action was brought by such proprietor, Mrs. Lucy Loxley, against the plaintiff and one Teague, who agreed to refer all the matters in dispute to the late Mr. Osborne, Q.C., and on his declining to proceed with the arbitration, to Mr. Eddis, Q.C. The matters in dispute were, first, the question of title, viz., whether there had been in fact any such trespass, and, if so, what was the amount of damages. The actual working was, beyond all question, by the copartnership of which the present plaintiff and defendant were members, and, as between Lucy Loxley and them, they were undoubtedly liable to answer for the trespass, if trespass there in fact was, and she, of course, had a right to sue any one of them without making the others co-defendants. But she did make Teague a co-defendant. Teague was one of the persons under whom the copartnership claimed title to work, and who were therefore the persons interested in the question of title, and who might be liable to indemnify the copartnership if they were cast in the suit. After the action brought and the reference to arbitration made, the fact of such arbitration was for the first time brought to the knowledge of the copartners or their solicitors. The plaintiff alleges that they assented to such [98] arbitration and took an active part in it. *The arbitrator decided that Mrs. Loxley had established that the

(¹) 3d ed., pp. 780, 804.

(²) 1 Coll., 589.

(³) 7 Cl. & F., 166.

workings were trespasses on her property, and that she was entitled to £6,000 damages in respect thereof, and he awarded the same, together with the greater part of the costs of the arbitration, to her. Hence this suit for contribution. The Vice-Chancellor decided against the plaintiff, on the ground that a partner has no right to refer to arbitration so as to bind his copartners without their concurrence, and that the acquiescence and assent, so far as there was acquiescence or assent to such arbitration, was made without the knowledge of certain material facts and circumstances connected with the litigation which the plaintiff ought to have communicated to them, and in fact that there never was any question referred to arbitration in which the partnership, *quâ* partnership, had a particle of interest. We are unable to concur in that view. The difference between the view taken by the Vice-Chancellor and ourselves is probably mainly due to the view which we take of what was the only legal and equitable effect of the arbitration as between the copartners themselves. If the assent to that arbitration created a liability, or amounted to an acknowledgment of a liability, we should have concurred with the Vice-Chancellor that they were not bound by the acts and communications relied on as evidencing such assent. But we are of opinion that no liability was thereby created as between the partners which did not previously exist, and no liability was thereby acknowledged. The only effect of the arbitration, according to our view of it, was to substitute the award of the arbitrator for the verdict of a jury, and the judgment of the court thereon. It was merely a matter of machinery. Such a mode of determining the questions in dispute was almost a matter of course. The defendants, the copartners, had every fact before them required to enable them to judge whether they would or would not assent to the arbitration proceeding. They were aware that they had or might have a very considerable interest in the action. The trespasses, or acts supposed to amount to such trespasses, were done by their agents and workmen. The nominal defendants were their managing partner and one of their lessors. What questions might afterwards arise as between them and the lessors, or between them and their managing partner, were wholly immaterial to the determination of the question whether, so far as they were concerned, they would assent to Mrs. Loxley's right and claim being determined and ascertained by an arbitrator. They assented under the supposition that they were in the ordinary position of copartners in respect of an action brought against

their copartner for a partnership act, that is, under the supposition that they had the greatest possible interest in the machinery by which that action was to be determined. It is scarcely possible to conceive that any sensible persons would have done otherwise than assent, and if they were aware of circumstances which would or might possibly or probably relieve them from all liability whatever in respect of the action, that certainly could have had no tendency to induce them to withhold their assent. They would, of course, have said, If we are liable to contribute, we assent to the machinery by which the amount is to be ascertained. If we are not liable, the machinery does not concern us.

We are of opinion, therefore, that so far as the arbitrator decided that the acts were trespasses, and that the damages were £6,000, the copartnership is bound by that decision in the same way and to the same extent as if the action had gone on to trial, and damages to that extent had been given by a jury.

It must be added to this, that beyond all question the only person liable to damages in Mrs. Loxley's action was Thomas. Teague might be liable to indemnify Thomas, and if the litigation had proceeded in its normal course, which would probably have been not only the action at law but a bill in equity, he would have been liable to costs; but in the mere action at law for the trespass he must have been entitled to a verdict of not guilty.

We have then to consider the question whether Thomas would or would not have been entitled to contribution on a judgment against him for £6,000 for the trespasses. *Prima facie*, damages given against one partner for a partnership act are to be paid like any other partnership debt, but with this exception, that if the damages were occasioned by the personal misconduct or culpable negligence of one partner, he alone must bear the consequences. In this case the defendants do charge the plaintiff with such misconduct or 200] *negligence. To dispose of this charge it is necessary to go into the history of the circumstances under which the trespasses or acts found to be trespasses were committed. [His Lordship here stated the facts as given above, down to and inclusive of the agreement of the 22d of February, 1859.] Under that agreement Trotter Thomas & Co. worked in the Hopewell Colliery, and, as was alleged by Mrs. Loxley and found by the arbitrator, trespassed beyond the boundary into her coal.

The plaintiff was the managing and resident partner, and it is charged against him that such trespasses could not

have occurred without very serious and culpable neglect on his part. Certain it is that it is one of the most important duties of the manager of a colliery, not merely a duty to his neighbors but to his principals, to keep carefully within his boundary. The consequences of not doing this are most serious. In the present case the profit at most could have been but very small, the net surplus of the selling price, after all the expenses of working and the royalty, while the owners, according to the law as then understood and applied, and as it was understood and applied by the arbitrator, would be entitled to the full value of the coal at the pit's or level's mouth, without any deduction for the costs of severance, or any other deduction, except for the expense of conveying it, after severance from the vein, to the surface.

To the commissioners' award were annexed plans of the Hopewell Colliery and Thatch or Independent Colliery, and any one looking at those plans must have seen that the workings had transgressed the boundary line as there depicted. The plaintiff Thomas acted with culpable carelessness if he never looked at the plans, and with most culpable recklessness if, looking at the plans, he determined to disregard them. Before the arbitrator, and at the hearing before us, it was strenuously contended that the inaccuracy of the plans was notorious in the forest; that the commissioners could only have made them approximately; and that, correcting the plans by the written descriptions, it was reasonably clear that the Hopewell Colliery, as awarded, did extend to and include the area in which the alleged trespasses were committed. And the Vice-Chancellor appears to have adopted this view, differing in that *respect [201 from the arbitrator. We have had a most minute examination of the plans and of the written descriptions by the counsel of both sides, and we find it impossible to adopt the plaintiff's contention. But, moreover, there being in existence plans made by the commissioners themselves in pursuance of the act of Parliament, and made by law part of their award, nothing could be more rash or reckless than to take all the risk of disregarding those plans on the chance of establishing a construction of the letterpress against the plans, the utmost profit being so trifling and the loss risked so great. It was a speculation which no partner had a right to involve his copartners in without their full knowledge and concurrence.

But the case does not stop there. It is manifest that this supposed error in the map and this supposed construction

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of the writing was a mere afterthought of the lawyers after the arbitration had been agreed on. It is not pretended that Mr. Thomas ever looked at the plans and letterpress, and came to the conclusion which was pressed before the arbitrator and in this suit. And it is manifest that even if he had examined the two he would have taken advice on the subject. But the matter does not stop there. After he had worked to some considerable extent, Mrs. Loxley discovered the fact, and in 1864 gave formal notice thereof, and required an account of the past trespasses and a discontinuance of them for the future. In answer to that notice we find that it was never suggested that the disputed coal was included in the Hopewell Colliery as awarded and set out by the commissioners. But a claim wholly inconsistent therewith was made to it as part of the Thatch or Independent Colliery, under an equitable or supposed equitable title under an agreement made as far back as the year 1802 between the then owners of the Thatch Colliery for a partition. It is difficult to see how any title under such agreement could have survived the statutory provisions and the commissioners' award; and even if there were any express equity or trust affecting the legal estate, it is difficult to see how such equity or trust could have survived all the changes and devolutions of title, or how Mrs. Loxley could have become under it a trustee for Peter Teague & Co. and their co-owners. In fact, it is idle to treat that document as [202] creating the relation of trustee *and *cestuis que trust*. It was a legal partition, giving one party one pit and workings, and the other party another pit and workings, and was precisely the right which was to be brought to the notice of the commissioners, and in default extinguished. At all events it is obvious that a right so doubtful, so apparently desperate, was not one under which the plaintiff had the slightest excuse for imperilling his partners, exposing them to the liability actually shown by the arbitration, and without any chance of substantial benefit.

It is not immaterial that the plaintiff was himself one of the persons claiming title under this agreement. We do not think that this in any way impugns the honesty of his conduct, for we believe that throughout the whole of the proceedings down to the time of the award, the plaintiff really thought that his partners had no substantial interest in the matter—that the question was one of title between Mrs. Loxley on the one hand, and the owners of the Hopewell Colliery on the other, and that the latter, under whose title the workings were held, were the persons really inter-

ested and really bound to bear any loss. But that affords no legal excuse for the want of reasonable care which he showed as between him and his copartners. It was strongly insisted on before us that, at all events, we ought to draw a line at the time of the notice in 1864. We cannot accede to that contention. We think the carelessness and recklessness were only aggravated by persisting to work after notice. The action, moreover, was brought in December, 1869, the notice was in May, 1864, and the Statute of Limitations was, with apparent success, insisted on. And it is impossible to say how much the arbitrator was influenced in his findings by the fact that the trespass was deliberately persisted in after express notice. The damages given for such a trespass would probably be very different from those of a mere casual or accidental encroachment beyond the boundary. It is impossible to speculate what the result would have been to any one if the plaintiff had, as he ought to have done immediately on the notice, discontinued the workings in the disputed area.

On these grounds we feel bound to affirm the Vice-Chancellor's decree. It was very strongly pressed on us that we should make a distinction as to costs, on the ground that actual fraud was *imputed to the plaintiff, which was [203 not sustained. But however much it is to be regretted that any such imputation should have been made either in pleading or argument, all the evidence to support the imputation of fraud was really the evidence of the facts and circumstances on which we have come to the conclusion we have expressed adverse to the plaintiff, and we are unable to relieve him from any part of the costs which the Vice-Chancellor directed him to pay. The appeal must be dismissed with costs.

Solicitors: *Rogerson & Ford; Barnes & Bernard; Jones & Starling.*

This case went upon the ground that, "*prima facie*, damages given against one partner for a partnership act are to be paid like any other partnership debt, but with this exception, that if the damages were occasioned by the personal misconduct or culpable negligence of one partner, he alone must bear the consequences": *Ante*, marg., p. 199.

The doctrine is analogous to that which holds that there is no contribution between wrongdoers, when the

fact that they are such is known to them at the time of doing the act complained of, and that there shall be when their act is done in good faith: 12 Eng. Rep., 322 note.

See Cooley on Torts, 144 *et seq.*; 2 Wait's Actions and Defences, 295 *et seq.*

Mr. Parsons (Par. on Part. (8d ed.), 818 marg., p. 285, note s.) lays down the rule that a suit for contribution cannot be maintained, either at law or in equity, in consequence of a recovery

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against one partner under a judgment in an action of tort. We doubt whether the rule is quite so general.

See 12 Eng. Rep., 322 note; 2 Wait's Actions and Defences, 300.

The relation of principal and surety grows out of the consent of all the parties, and the principles belonging to it, in respect to the right of recovery over, can have no necessary application to a case where one, without intentional wrong on his part, has been induced by the fraud of another to do an act for which he has been held accountable as for a wrong committed as against a third party: *Kenyon v. Woodruff*, 33 Mich., 310.

It seems that the promise of indemnity, which the law implies on the part of the person at whose instance and request another does an act supposed at the time to be lawful, but which turns out to have been wrongful as to third persons, is limited to indemnity against the natural consequences of the act. When the act is a trespass, the damages which the party committing the trespass might be compelled to pay

are recoverable against his principal. If sued, before defending the action, it is his duty to give his principal notice that he may either elect to conduct the defence or make voluntary satisfaction. But if the agent is justified in defending and incurring costs without specific direction, he is not justified in continuing the litigation without the sanction and at the expense of his principal, after the right of the third person has been established by judgment in his favor: *People v. Town Auditors*, 74 N. Y., 310, affirming 10 Hun, 551.

A municipal corporation employing one to dig trenches in its streets, for water pipes, he to guard and light them, and to be responsible for all damages in case of neglect, is not in *pari delicto* with the contractor, and may recover of him the amount recovered against it by one injured in consequence of the contractor's negligence, he having been notified of the suit, and had an opportunity of defending it or assisting at the defence: *Campbell v. Somerville*, 114 Mass., 334.

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Municipal Corporation—Opposing Bill in Parliament, Expenses of—Charging Borough Fund—Interference with Corporate Rights—Municipal Corporations Act, 1835 (5 & 6 Will. 4, c. 76), s. 92—Municipal Corporations (Borough Funds) Act, 1872 (35 & 36 Vict. c. 91), s. 8.

Municipal corporations having been reduced by the Municipal Corporations Act, 1835, from the position of owners of property to that of trustees, possess the ordinary right of trustees to defend their trust property and their rights as trustees from attack at the expense of the trust estate.

Consequently, a municipal corporation has the right, either under section 92 of the Municipal Corporations Act, 1835, or under the general law applicable to trustees, to defray, out of the borough funds or rates, the expenses of any attack made by bill in Parliament, whether against their existence as a corporation, or against their property, or only against their rights, powers, or privileges; and that right is not taken away by the Municipal Corporations (Borough Funds) Act, 1872.

Bright v. North ⁽¹⁾, *Attorney-General v. Corporation of Wigan* ⁽²⁾, and *Reg. v. Mayor of Sheffield* ⁽³⁾, considered.

By an act of Parliament passed in 1838 (1 Vict. c. 12, Loc. and Pers.) the Corporation of Brecon were empowered to

⁽¹⁾ 2 Ph., 216.

⁽²⁾ Kay, 268; 5 D. M. & G., 52.

⁽³⁾ Law Rep., 6 Q. B., 652.

purchase lands in the borough of Brecon for new market places; to erect a market house and buildings; to make regulations for the management of the markets; to provide slaughter houses, and to levy tolls.

By sect. 34 the corporation were empowered to apply the tolls authorized by the act, after payment thereof of the expenses incident to providing the market place, first, in setting apart such sum as with the tolls receivable by the corporation from their other property should be necessary to make up the annual sum of £210, the amount of the net annual income of the corporation from the whole tolls of the borough and their other property; of which sum of £210 a competent part was to be applied in defraying the interest on incumbrances affecting the corporation property, and the remainder was to be applied by the corporation *to [205 such purposes and in such manner as they were by law then authorized and empowered to apply their said net annual income" (that is to say, as directed by sect. 92 of the Municipal Corporations Act, 1835); and afterwards such surplus tolls were to be applied in or towards payment of interest and capital on mortgages made under the act; and subject thereto, the whole of the surplus tolls were to be applied by the corporation "to such purposes of public benefit within the said borough as to them should seem meet."

The corporation built a market house under their act, but having failed to provide new market places and slaughter houses, an act was passed in 1862, intituled the "Brecon Markets Act, 1862," authorizing a company called the "Brecon Markets Company" to provide the necessary market places and slaughter houses. This act contained the following provisions:—

By sects. 21 and 22 the markets and fairs in the borough, the market house, market places, and the works and conveniences connected therewith, the tolls, lands, and other property of the corporation were vested in the company, with the exception of the guildhall and police station, and a sum of £200 due to the corporation as compensation for certain land taken for the county gaol.

Sect. 42 provided that from and after the commencement of the act the yearly sum of £210 should be paid to the corporation by the company in substitution for the annual sum of £210 mentioned in the act of 1838.

Sect. 43 provided that the annual sum so to be paid by the company should be a first charge on the tolls, markets, and market places vested by the act in the company, and

(sect. 44) should be applied in the manner mentioned in sect. 34 of the act of 1838.

Sect. 65 provided that the company might, from time to time, if and when they thought fit, "and with, but not without the consent of the corporation," provide and maintain proper slaughter houses upon such sites as they thought expedient.

Sect. 80 provided that the company should not at any time lower, raise, or alter any of the tolls, without in every case the consent of the corporation.

206] *Sect. 82 empowered the company to let the markets and fairs, market houses and market places and places for fairs, and the slaughter houses and tolls, for any period not exceeding three years.

Sect. 89 provided that the company and the corporation might from time to time enter into and carry into effect all such contracts with respect to any of the purposes of the act, and in accordance with the provisions thereof, as they respectively thought fit.

Sect. 90. "Except only as by this act expressly provided, nothing in this act contained shall take away, lessen, prejudice, or alter any of the jurisdictions, franchises, estates, rights, interests, powers, authorities, privileges, or immunities of the corporation."

Acting under the powers of this act, the company provided a cattle market in the borough, and also erected slaughter houses on a site selected and approved of by the corporation, but the corporation refused to give their sanction to the company using the slaughter houses, on the ground, as it appeared from the evidence, that their accommodation was insufficient, and that in other respects they were not suited to the requirements of the town, and would create a serious public nuisance.

The company thereupon, in 1878, with the sanction of the Local Government Board, presented a bill in Parliament for the extension of their powers. The bill when introduced into Parliament contained the following clauses:—

2. Power for the company "to use and maintain the slaughter houses already provided and erected by them on the site selected by the corporation as aforesaid . . . without any further consent from the corporation;" such slaughter houses to be deemed part of the market place.

5. Power for the company from time to time, as or when they thought fit, to lower the tolls, "notwithstanding that they might not have obtained the consent of the corporation thereto, as required by the 80th section of the act of 1862."

6. Power for the company to let the markets, &c., for ten years, instead of three only, as provided by sect. 82 of the act of 1862.

*9. Power for the company to sell their markets, [207 property, and undertaking, or any part thereof, to the corporation.

14. Power for the corporation to raise the purchase-money by borrowing on mortgage of the premises purchased.

17. The company to be exempted from parochial rating in respect of the annual sum of £210, payable by them to the corporation under the act of 1862.

The bill was petitioned against and opposed by the corporation, but a petition in favor of the bill as it stood was presented by a very large number—the majority, it was said—of landowners and ratepayers of the borough.

The bill was eventually passed by the committees of both Houses of Parliament, and received the royal assent under the title of the “Brecon Markets Amendment Act, 1878.” However, during the passage of the bill through Parliament the corporation insisted on several amendments, some of which were adopted. In particular, at the instance of the corporation, clause 2 was ultimately amended by directing that the slaughter houses should be completed, altered, or constructed according to plans to be approved by the Local Government Board; and clauses 6 and 17 were entirely expunged.

The corporation having proposed to charge the expenses incurred by them in opposing the bill upon the funds or rates of the borough, this action was instituted against the corporation by the Attorney-General, at the relation of two ratepayers of the borough, for an injunction restraining the corporation from charging or attempting to charge any of such expenses upon the borough fund or borough rate, or any other fund or rate under the control of the corporation, or upon any part or parts of such funds or rates respectively; and from applying any moneys produced or to be produced by any rates or funds under the control of the corporation in or towards the payment of any of the said expenses, unless and until such consent and sanction to the said opposition to the said bill, and the charge and payment of the expenses thereof upon or out of such funds or rates should have been given as required by the Municipal Corporations (Borough Funds) Act, 1872 (35 & 36 Vict. c. 91).

The statement of claim alleged, and it was admitted by the *defendants, the corporation, that no resolution [208

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had ever been passed by the corporation, or the council thereof as a governing body, or by the owners and ratepayers of the borough in accordance with the provisions of the Municipal Corporations (Borough Funds) Act, 1872, or otherwise, charging or consenting to charge the expenses of the corporation's opposition to the bill on the funds or rates of the borough or any part thereof; that no meeting of the corporation, or the council thereof, had in fact ever been summoned for the purpose, and no meeting of the owners and ratepayers of the borough had ever been held or summoned for the purpose of considering whether such expenses should be charged on or paid out of the funds or rates of the borough, or how the expenses should be borne; and that no approval of any such step by the Local Government Board of the borough had ever been given or applied for by the corporation.

The corporation in their statement of defence denied that they were bound to comply with the provisions of the Municipal Corporations (Borough Funds) Act, 1872, and claimed to be exempt from complying with the provisions of sect. 4 of the said act on the following grounds: (1) that the bill introduced by the company would, if passed into law in the form in which it was introduced, have been prejudicial to the rights and interests of the burgesses and inhabitants of the borough; would have legalized the creation and continuance of public nuisances within the borough; would have deprived the corporation of rights, powers, and privileges conferred on them by the Municipal Corporations Acts and the other acts in force relating to the borough; and would have deprived the corporation and the burgesses of a considerable part of the income which they derived from the borough rate: (2) that the opposition complained of, and the incurring of the expenses complained of, were proper and necessary for the public benefit and interests of the burgesses and inhabitants of the borough, and for the protection of their rights and property, and for carrying into effect the provisions of the Municipal Corporations Acts and the other acts relating to the borough, and had been duly sanctioned and directed by the council of the borough: (3) that under the acts of 1838 and 1862 the corporation had a surplus borough fund applicable for payment of the expenses complained of, and out of which they were entitled to defray such expenses: (4) that the payment of such expenses was authorized by the Municipal Corporations Act, 1835 (5 & 6 Will. 4, c. 76), s. 92: (5) that the corporation had done all things necessary to entitle them

to pay such expenses out of the said surplus fund : and (6) that the power of the corporation to charge and pay such expenses on and out of the said surplus fund without complying with the provisions of sect. 4 of the Municipal Corporations (Borough Funds) Act, 1872, was saved to them by the 8th sect. of that act.

The corporation further contended that under the provisions of sect. 92 of the Municipal Corporations Act, 1835, they were entitled, under the circumstances, to pay the expenses in question out of the borough fund as well as out of the surplus fund.

The Attorney-General alleged in his reply that the surplus fund referred to by the corporation in their defence formed part of the borough fund within the Municipal Corporations Act, 1835 ; that the defendants were one of the corporations named in schedule A to that act ; that they had no surplus of their borough fund within that act ; and that they had no power, either under that act or otherwise, to charge the expenses incurred by their opposition to the bill in question upon any of the funds, rates, or properties of the borough.

From the evidence on the part of the ratepayers it appeared that after bringing into account the sums payable under sect. 34 of the act of 1838, and sect. 42 of the act of 1862, and providing for the matters specifically mentioned in sect. 92 of the Municipal Corporations Act, 1835, there was no surplus fund applicable for the public benefit within the meaning of the latter act.

Issue having been joined, the action now came on for trial.

Whitehorne, and *Macnaghten*, for the Attorney-General : There being no surplus fund under the act of 1838, the corporation have no power to apply the borough funds or rates in payment of the expenses of opposing this bill. They might possibly have done so had they obtained the sanction of the ratepayers by special meeting for the purpose under sect. 4 of the Municipal Corporations (Borough Funds) Act, 1872 ; but that they failed to do ; therefore that act does not apply to the present case.

*The whole question then turns upon the meaning [210 of sect. 92 (') of the Municipal Corporations Act, 1835 ; that

(') The material parts of sect. 92 of the Municipal Corporations Act, 1835 (5 & 6 Will. 4, c. 76), are as follows:— "After the election of the treasurer in any borough, the rents and profits of all hereditaments, and the interest, dividends, and annual proceeds of all

moneys, dues, chattels, and valuable securities belonging or payable to any body corporate named in conjunction with the said borough in the said schedules (A) and (B), or to any member or officer thereof in his corporate capacity, and every fine or penalty for

is to say, the question is whether these expenses are to be considered as "expenses necessarily incurred in carrying into effect the provisions of that act."

In the first place, we submit that those words do not include opposing a bill in Parliament; nor have the corporation brought themselves within the clause immediately following as to the application of the borough fund "for [211] the public benefit of the *inhabitants," inasmuch as there is no surplus fund: *Reg. v. Mayor of Sheffield* (*).

It is true that in *Attorney-General v. Corporation of Wigan* (*), the expenses of a parliamentary opposition were allowed, although there was no surplus fund: but all the court there decided was that it would not grant an interlocutory injunction to prevent such an application of the borough fund; no rule being laid down as to what would be done at the hearing. Moreover, that decision is commented upon with disapproval by the Court of Queen's Bench in *Reg. v. Mayor of Sheffield*.

The corporation will probably rely on *Bright v. North* (*), *Attorney-General v. Andrews* (*), and *Attorney-General v. Mayor of Norwich* (*), as authorities that a corporation may

any offence against this act (the application of which has not been already provided for) shall be paid to the treasurer of such borough: and all the moneys which he shall so receive shall be carried by him to the account of a fund, to be called 'The Borough Fund'; and such fund," subject to the payment of debts, &c., "shall be applied towards the payment of the salary of the mayor, and of the recorder and of the police magistrate hereinafter mentioned when there is a recorder or police magistrate, and of the respective salaries of the town clerk and treasurer, and of every other officer whom the council shall appoint, and also toward the payment of the expenses incurred from time to time in preparing and printing burgess lists, ward lists, and notices, and in other matters attending such elections as are herein mentioned, and, in boroughs which shall have a separate court of sessions of the peace, as is hereinafter provided, towards the expenses of the prosecution, maintenance, and punishment of offenders, and towards such other sum to be paid by such borough to the treasurer of such county as is hereinafter provided, and towards the expense of maintaining the borough gaol, house of correction,

and corporate buildings, and towards the payment of the constables, and of all other expenses not herein otherwise provided for which shall be necessarily incurred in carrying into effect the provisions of this act, and in case the borough fund shall be more than sufficient for the purposes aforesaid, the surplus thereof shall be applied, under the direction of the council, for the public benefit of the inhabitants and improvement of the borough. . . . And in case the borough fund shall not be sufficient for the purposes aforesaid, the council of the borough is hereby authorized and required from time to time to estimate, as correctly as may be, what amount, in addition to such fund, will be sufficient for the payment of the expenses to be incurred in carrying into effect the provisions of this act; and in order to raise the amount so estimated the said council is hereby authorized and required from time to time to order a borough rate in the nature of a county rate to be made within the borough," &c.

(1) Law Rep., 6 Q. B., 652.

(2) Kay, 268; 5 D. M. & G., 52.

(3) 2 Ph., 216.

(4) 2 Mac. & G., 225.

(5) 2 My. & Cr., 406.

apply their funds in resisting a bill in Parliament; but those decisions went upon the ground that such a resistance was justifiable if the bill prejudicially affected the property of the corporation, or threatened their existence as a corporation.

Secondly, assuming that sect. 92 would authorize such an expenditure if the opposition were necessary for the defence of the property or existence of the corporation, then we say that that was not the case here; for the existence of the corporation was certainly not threatened by this bill, and as regards property they had none, inasmuch as by the act of 1862 their entire property, with trifling exceptions, was transferred to the company.

Thirdly, the corporation, being in the position of trustees for the ratepayers, are bound, if they expend their trust money in protecting the trust property, to show that the expenditure is reasonable and proper—as was laid down by Lord Justice Turner in *Attorney-General v. Corporation of Wigan* (¹), and by Mr. Justice Blackburn in *Reg. v. Mayor of Sheffield* (²). But here we show that the expenditure was neither reasonable—for a majority of the ratepayers were in favor of the bill—nor proper, for the corporation who, before the passing of the Municipal Corporations (Borough Funds) Act, 1872, might have maintained their right to act *on their own judgment as to whether it was proper [212 to oppose or not, had by that act a special means provided to enable them to ascertain the opinion of the ratepayers; so that, by not having adopted the course so provided for them, their responsibility has been proportionately increased.

Ince, Q.C., and *R. S. Wright*, for the defendants, the corporation: The 92d section of the Municipal Corporations Act, after providing that the borough fund, that is, the income of the corporation property, may be applied towards the expenses “which shall be necessarily incurred in carrying into effect the provisions of the act,” goes on to provide that, “in case the borough fund shall not be sufficient for the purposes aforesaid,” the council of the borough may order a borough rate in the nature of a county rate; and that such a borough rate, “subject to the provisions hereinafter contained, shall be applied to all purposes to which before the passing of this act a borough rate or county rate was by law applicable in such borough or county.” According to the general law, and looking at the intention of the act as shown by the preamble, coupled with sects. 90 and 92, we submit that we were entitled to defray these ex-

(¹) 5 D. M. & G., 55.

(²) Law Rep., 6 Q. B., 668.

penses out of the borough fund or by a borough rate, as being "expenses necessarily incurred in carrying into effect the provisions of the act," the corporation being—as Lord Hatherley, when Vice-Chancellor, said in *Attorney-General v. Corporation of Wigan* (*)—responsible for the good rule and government of the town, and therefore justified in opposing any enroachment on their authority.

The question then is, were not the rights of the corporation, as the governing body of the borough, sought to be interfered with by this bill to such an extent as to justify their opposition? Looking at the bill as originally introduced, it is impossible not to come to the conclusion that it very materially interfered with existing rights of the corporation; for, amongst other things, it sought to dispense with their consent as to the user of the slaughter-houses—a very important matter on sanitary grounds; also to enable the [213] company to lower the tolls without the *consent of the corporation; also to give a power of purchasing to the corporation—which surely entitled the corporation to have a voice in the settlement of the terms on which such purchase should be made; and to exempt the company from parochial rates in respect of the annual sum of £210 payable by them, thus throwing an additional burden on the other ratepayers.

In *Attorney-General v. Corporation of Wigan* (*), it was held that, under sects. 90 and 92 of the Municipal Corporations Act, the corporation, whether they had any surplus borough fund or not, were, by virtue of their right to prevent a nuisance, justified in applying their funds in opposing a bill for legalizing the abstraction of water from a river which constituted the main sewer of the town. So here we say that this bill proposed to legalize what would, in the opinion of the corporation, have occasioned a serious nuisance; for the bill sought to deprive the corporation of their control over the user of the slaughter houses. We therefore come strictly within *Attorney-General v. Corporation of Wigan*.

Reg. v. Corporation of Tamworth (*) is an authority that costs of litigation undertaken *bona fide* and on reasonable grounds for the defence of corporate rights, may be paid out of the borough fund, though such litigation is eventually unsuccessful. In the present case the corporation had distinct rights, which, we submit, they were entitled to defend just as much as if their property, and not merely their rights had been attacked.

(*) Kay, 277.

(*) Kay, 268; 5 D. M. & G., 52.

(*) 19 L. T. (N.S.), 493.

[They were stopped by the court.]

Whitehorne, in reply: In all the cases in which corporations have been allowed the expenses of opposing a bill in Parliament, the bill has sought to interfere with actual property of the corporation, not simply with their powers.

We submit that this case is covered by *Reg. v. Mayor of Sheffield* (¹), where the Court of Queen's Bench considered that *Attorney-General v. Corporation of Wigan* was decided on technical grounds, and expressed dissatisfaction with the Vice-Chancellor's view of the meaning of the Municipal Corporations Act.

*[JESSEL, M.R.: It is singular that *Bright v. North* (²) does not appear to have been cited in *Reg. v. Mayor of Sheffield* (³). It is certainly unfortunate that it was not considered by the Court of Queen's Bench.]

Bright v. North is, no doubt, the strongest case against me, but it is distinguishable on the ground that there was actual property, namely, river banks, which the bill threatened to affect injuriously; whereas in the present case there was no interference with property at all.

This bill imperilled neither the property nor the existence of the corporation. At most, it affected only certain of their rights: and surely a corporation is not entitled to apply its funds in opposing every bill that may affect them, however incidentally. What Lord Justice James, when Vice-Chancellor, said in *Attorney-General v. West Hartlepool Improvement Commissioners* (⁴) is very applicable to this case: "One cannot but feel that if there were an unlimited power for bodies of this kind to apply, whenever they might think fit, to Parliament at the expense of their constituents, they themselves having determined to do it of their own mere motion, without calling a general meeting of the ratepayers . . . one can easily see there would be a great deal of that class of professional business got up which would be done at the expense of the ratepayers."

We submit, therefore, that this opposition, having been conducted against the wishes of a majority of the ratepayers, and without any attempt first to ascertain the opinion of the general body upon the subject, was unreasonable and improper; and that, consequently, the burden of defraying the expenses of an opposition so conducted should not be thrown upon the ratepayers.

JESSEL, M.R.: The case before me is one of a very special character, and one which, as far as I know, has never

(¹) Law Rep., 6 Q. B., 652. (²) 2 Ph., 216. (³) Law Rep., 10 Eq., 152, 157.

occurred before. It raises important questions both as regards the meaning of public acts of Parliament and as regards the general law.

215] *In the first place, there is no doubt that the Municipal Corporations Acts were intended to impose great restrictions on the dealings by municipal corporations with the corporate funds. In substance, whatever the words used were, the Municipal Corporations Act, 1835, reduced municipal corporations from the position of owners of property to the position of trustees of property. Instead of having the power which such corporations possessed before the passing of the act—and sometimes abused—of disposing of their property pretty well in any way they thought fit, they were restricted to certain definite purposes pointed out by the 92d section of the act, that being the principal section and the others being merely ancillary. In substance, as I have said, they were reduced to the position of trustees.

The 92d section provided for certain expenses which, in the case of the borough funds not showing a surplus over what I will call the ordinary expenses of the borough, were restricted to expenses necessary for carrying the purposes of the act into execution. Probably more definite words might have been used; for the word "necessary," like most other words in the English language, has only a relative meaning, and what may be necessary in one case may not be so in another; you cannot lay down any absolute rule as to what is necessary.

Now it is manifest, the moment you read the act, that if you read "purposes" as meaning merely "express purposes," a corporation would be left in this position—that they could not even defend their property or their very existence against attack. If, therefore, the word "purposes" is to be read in the narrowest sense, that is, as meaning the purposes expressed by name in the act, this would follow, that if an action of ejectment, or what is now called an action for recovery of land, were brought against the corporation to get from them the whole of their landed property, they would not be justified, under the Municipal Corporations Act, in incurring the costs of defending that action. That, of course, is too extravagant, and it must therefore be assumed that there is to be found somewhere, either under the word "purposes," as mentioned in the 92d section, or under the general law, a provision for such a case as that.

Again, if a proceeding were taken to destroy their charter
216] of *incorporation, either directly or indirectly, it

would be absurd to say that the corporation were not entitled to resist those proceedings, and not the less so if the proceedings were by bill in Parliament instead of by action in a court of law. Acts threatening the existence of the corporation itself must be resisted, and must be resisted, of course, at the expense of the corporation. Here again, if you read the word "purposes" in the narrow and restricted view, it would be difficult to find any such purpose expressed in the act; but you must either read it in the larger way, or else you must assume that the Legislature intended that the ordinary rights of corporations in defending themselves against attack, whether by action at law or by bill in Parliament, or otherwise, should be reserved to them. It does not appear to me to be very material to consider which is the proper view to take, because they both conduct you to the same conclusion, that is to say, according to the first view the words to be found in the act of Parliament imply that there must be a mode of construction which includes such objects; and according to the second view the act of Parliament reserves the ordinary rights of corporations as of persons to defend themselves.

That being so, and independently of the recent act of Parliament, what is the principle upon which corporations should be allowed to defend themselves? There are decisions which go expressly to defending their property from attack and defending their existence from attack. Does not the principle go further? The existence of a municipal corporation is an existence not simply for the purpose of affixing a seal, but for the purpose of the government of the town; and therefore if their duties and rights of government are interfered with, their existence is to that extent interfered with, though it is not the actual existence of the corporation. It is the existence of their corporate powers which in fact goes to make up the entire existence of a corporation; and it appears to me that a corporation has the right to defend its powers when attacked, upon the same principle that it has the right to defend its actual existence from attack.

Supposing the corporation has a power to regulate the fairs and markets within the borough, and an individual claims the right, as lord of the manor, to control the regulations of the fairs and markets, then it is clear the [217 right to make the regulations is in the nature of property—a right to levy tolls, and so on.

But suppose a company is established to take possession of the fairs and markets, and levy the tolls and take them

out of the hands of the corporation, and promotes a bill in Parliament for the purpose, there it is also quite clear ; but suppose there is no property in the corporation at all, but merely a right to regulate the fairs and markets, that is, to prescribe the places where the fairs and markets shall be held, to prescribe the tolls that shall be taken in respect of them, and to prescribe the times at which the fairs and markets are to be held—is it to be supposed that an individual or a company can present a bill to Parliament for taking away those privileges and duties of the corporation, and that the corporation shall have no power of defending itself, shall have no right to expend the money necessary for defending its privileges and duties as a corporation ? It appears to me that the mere statement of the question shows that there is no valid distinction between the right of property—which, after all, is only held by the corporation as trustee for public purposes—and the powers and privileges, forming a larger or possibly a smaller share of the government of the town which are conferred on the corporation, and with which it is sought to interfere. As I said before, it seems to me that, on principle, you must imply a right in the corporation to defend itself from such an attack.

Now, if that is so, it is of very little consequence, as I have said, by what means that conclusion is arrived at. I find the judges in some cases have adopted the one method, that is, they have read the right as implied in the term “necessary expenses” in the act of Parliament. In others they have adopted the second method, and said the act of Parliament must be intended to reserve to the corporation the ordinary rights of corporations. It does not appear to me, as I said before, material which method is adopted ; but I think it is quite clear that the decisions go to this, that the right of a corporation to defend itself from an attack of this kind extends not merely to property—not merely to the existence of the corporation in the smallest sense, that is, to the continued existence of the corporation as such, but to its existence also in the larger sense, that is, 218] to the existence of the corporation *with all its rights and privileges ; and that an attack on a substantial portion of its privileges, rights, and duties, is as much within the purview of the authorities as an attack on its property or its mere existence.

First of all, as regards authority, the strongest case on the part of the relators is certainly that of *Reg. v. Mayor of Sheffield* ('). I by no means say that that case is not, in

(') Law Rep., 6 Q. B., 652.

my opinion, rightly decided, or that I have any cause for criticising it adversely, but it does not go to the extent contended for on behalf of the relators.

The judgment of the Lord Chief Justice goes very much upon the principle that I have mentioned. He says (¹), "With regard to the expenses incurred in opposing the bill in Parliament, I think it is abundantly clear, and open to no doubt or question, that that was a purpose to which, looking at the words of the section, it was altogether beyond the scope of the municipal government, or anything to be done under that act of Parliament in a borough without a surplus fund, to apply the borough funds." "Altogether beyond the scope of the municipal government." That is the ground of his decision. I shall show presently that in this case the purpose is by no means beyond the scope of the municipal government.

Then his Lordship goes into the reasons for coming to that conclusion, and justifies it. But he then goes on to comment on a case in which I must say a different conclusion to a certain extent seems to have been arrived at; I mean the case of *Attorney-General v. Corporation of Wigan* (²); but it is quite plain that the ground of the Lord Chief Justice's decision is that the opposition in question was beyond the scope of the municipal government.

Then Mr. Justice Blackburn, in his judgment, says this: "Those are two separate questions; first, whether they might lawfully and properly do what they did; secondly, whether they might charge the borough fund for the purpose." Then, after explaining the object of the act, he says this: [His Lordship then read part of the judgment at p. 663, commencing "Now, can we say as to *these two [219 matters," down to "the objects of the acts within the general terms," and continued:] So that Mr. Justice Blackburn's decision comes to this, that inasmuch as the corporation had property, and inasmuch as the income of the property was applicable to the borough fund, the preservation of that property must be considered a purpose of the act. That is one way of putting it, but he finds it a purpose of the act by inference; it is not within the express powers. It consequently comes to this, that any necessary incident to property (and there is no distinction in the world that I can see between property and powers for this purpose) is a purpose of the act.

Again, I will go back to the illustration I have already given, which is very germane to this case, the regulation of

(¹) Law Rep., 6 Q. B., 657.

(²) Kay, 268; 5 D. M. & G., 52.

the markets. The right of regulating the markets is part of the municipal government of the town: it is part of the rights and privileges enjoyed by the corporation, and is as much within the judgments of the Lord Chief Justice and Mr. Justice Blackburn as actual property in the market itself. It is vested in the corporation for the benefit of the town as part of the government of the town; and he who seeks to interfere with the privileges and duties connected with the regulations must be resisted, and, of course, resisted at the expense of the corporation.

It does not appear to me that that judgment at all prevents a corporation defending an attack upon such a portion of its privileges.

Now I come to a case which does not appear to have been cited—and I am sorry it was not—in *Reg. v. Mayor of Sheffield* (*). It is a case which, of course, as far as I am concerned, is of higher authority than the judgment of the Queen's Bench, because it is a judgment of the Lord Chancellor. It is the well known case of *Bright v. North* (*). When I come to read that case I find this. There was an act of Parliament providing for the better conservation of the banks of the River Ouse. The lands adjacent to the banks at each side were divided into six districts, and it was provided that the portion of the banks comprised within each district should be maintained by commissioners to be appointed from among the owners of lands of a certain 220] quantity within such *district, by means of funds to be levied by a district rate, not exceeding 3s. an acre in each year; and the fund so raised was to be applied "in making, doing, constructing, and executing, all such works, acts, matters, and things, as by such commissioners should from time to time be deemed necessary, proper, or expedient for putting so much of the bank as was situate within their respective districts into and for maintaining the same in a permanent state of stability."

As I read the report of the case, and as I know from experience as regards other similar acts of Parliament, there is no pretence for saying that the ownership of the banks was taken away from the landowners and vested in the commissioners. They were conservators and nothing more.

Now the Lord Chancellor says this (*): "The commissioners of each district are bound by the act to protect the lands adjacent to the banks"—so they were; they were as much bound to protect the land adjacent to the banks as to keep the banks in order—"from inundation, and they are

(*) Law Rep., 6 Q. B., 652.

(*) 2 Ph., 216.

(*) 2 Ph., 219.

authorized by the act to levy a rate on the proprietors of the district to defray those expenses." Again, the lands adjacent to the banks of course did not belong to them. Then it was alleged that the works which were to be undertaken by the promoters of the bill in Parliament which they were opposing might be injurious to the banks; and the question was, whether the commissioners were authorized—having no special power for this purpose—to oppose the bill in Parliament. The Lord Chancellor says this:—[His Lordship read part of the judgment at pp. 220, 221, commencing, "The bill, therefore, raises this proposition," down to "the duties imposed upon them;" and continued:] It comes therefore to this, that a bill promoted in Parliament which the commissioners thought would injure the lands might be opposed by them on the ground that it was their duty to protect the banks and the lands adjacent, and not on the ground of their having any right of property either in the banks or in the lands adjoining.

Bright v. North is therefore a decision that a proposed interference by act of Parliament with the powers of the commissioners *and with their duties, is such an in- [221]terference as fairly entitles them to appear before a committee of either House to oppose the bill.

When we come to look at the case which was very much commented on in *Reg. v. Mayor of Sheffield* (*), namely, the case of the *Attorney-General v. Corporation of Wigan* (*), whatever view we take of the construction put upon the Municipal Corporations Act by Lord Hatherley when Vice-Chancellor, we shall see that he simply founds his decision on *Bright v. North* (*) and nothing else. His decision does not rest at all on the notion of injury to property. He reasons out, in a way which has not been satisfactory to the judges of the Queen's Bench, and, if I may humbly say so, is not altogether satisfactory to me, a power in the corporation to restrain nuisances generally; but having found that power and the duty to stop nuisances generally, he then goes on in this way: he says they have a plain duty of taking care there shall be no nuisance in the town. Now assuming he is right so far, then I think there is no possible fault to be found with his judgment. The real difficulty in the judgment is that you cannot find the power without giving to the restricted words of the section which he commented on a very much larger meaning than they fairly bear. That really is the criticism on the judgment by the

(*) Law Rep., 6 Q. B., 652. (2) Kay, 268; 5 D. M. & G., 52. (3) 2 Ph., 216.

Court of Queen's Bench, or at least by three of the judges of that court.

But if you once arrive at the same conclusion as the Vice-Chancellor did as to the true construction of the section, that there was the power to abate nuisances generally, and the duty to prevent it, I think his reasoning is—as he says it is—exactly in accordance with *Bright v. North*. He says ('): "It seems to me very strange to say, if it be a corporate duty to prevent nuisances, and to prevent them by by-laws, yet, if an enormous and gigantic nuisance was about to be perpetrated, and the corporation were to take steps, by applying to this court through the medium of the Attorney-General, for an injunction to restrain such nuisance, that they would not be allowed the costs of such a proceeding." And then he goes on, in reference to the nuisance of abstracting 800,000 gallons of water a day from the town—"it would be a very strange thing to say, 222] in the case of a continued nuisance of *that description, although the corporation are under at least a moral obligation to protect the town from all petty nuisances, yet that they shall not lay out a farthing to prevent a large nuisance like that to all the inhabitants of the borough;" and so, I think, it would—that is, if the Vice-Chancellor's construction of the previous portions of the act of Parliament could be supported. Then, as he says, it is a case of duty which is interfered with by the proposed legislation; it is a case, in effect, of attempted deprivation of the corporation of a part of their powers and duties, and they ought to be entitled to prevent it.

I am quite aware that in looking at the report of the case on appeal (') the correctness of the Vice-Chancellor's reasoning appears to be by no means so clear. The Lord Justice Knight Bruce says ('): "The costs in question were incurred by measures which (in effect merely defensive) were taken by the corporation of Wigan, not unsuccessfully nor uselessly for the purpose of preventing or diminishing the mischief to the town of Wigan, that certain intended proceedings (reasonably considered as likely to interfere materially with its drainage, and so to render the air less pure, and cause general inconvenience there) were, not without probable grounds, thought likely to occasion mischief, which (not solely of a public nature) might well have been expected to be also prejudicial to property belonging to the corporation."

Now although there is no statement in the report of the

(') Kay, 278.

(²) 5 D. M. & G., 52.

(³) 5 D. M. & G., 54.

case in Kay's Reports of any injury being alleged by the bill, I see it was alleged in the argument before the Vice-Chancellor that the corporation possessed houses and property within the borough likely to be injured; and I gather from this that Lord Justice Knight Bruce was not satisfied with the reason of the Vice-Chancellor as to there being a general duty to prevent nuisance imposed on the corporation, and that he took hold of this, which does not appear from the report to have been alleged in the bill, that there was a probability of injuring property. Certainly the judgment proceeds on no other ground; and the same remark may be made as to the shorter but by no means less clear judgment of Lord Justice Turner, who says ('), "The Municipal Corporations Act contains no *express provi- [223 sion authorizing the application of the funds of corporations to the payment of expenses incidental to the protection of the corporate property. That has been left to the general law, which sanctions such expenditure, if reasonably and properly incurred." He takes the other view, that is, that the act is silent, but leaves the general law to take effect, not limiting it to the words "necessary expenditure." He goes on, "The expenditure here in question was, as it seems to me, incurred *bona fide* for the protection of the corporate property, and my present impression is, that it was reasonably and properly incurred."

Therefore the judgment in the Appeal Court proceeds simply on the protection of the corporate property: it does not, so far as I can gather, in the slightest degree touch the judgment in the court below so far as regards the latter portion of it; but I think the Appeal Court doubted whether the former part of it, namely, the proposition that it was a duty of the corporation to restrain nuisances generally, could be supported. Therefore they confined their judgment to the question of property.

It seems to me, therefore, looking at the authorities, that whether we take the one view or the other—whether we consider that under the words "expenses necessarily incurred," or similar words, used in the act, this incidental expenditure is included; or whether we consider that the general law as to the rights of trustees defending their property and privileges remains unaffected—in either way, if there is an attack by proposed private legislation on the rights, privileges, and duties of a corporation, that corporation is entitled to defend itself before Parliament.

Now, before concluding what I have to say as to the law,

(¹) 5 D. M. & G., 55.

I should like to say a word or two as to the recent act of Parliament, the Municipal Corporations (Borough Funds) Act, 1872.

As I read that act of Parliament, it very much increases the responsibility of corporations who choose to act in opposing bills in Parliament without obtaining the sanction of the ratepayers; because, if unsuccessful, it will be more difficult for them now than it was formerly to show that the expenses ought to have been allowed, inasmuch as they could readily have obtained the sanction which would have protected them from all consequences of want of success.

224] *But still I must read the act as I find it; and I find in the 8th section of the act these words, "Nothing in this act shall extend or be construed to alter or affect any special provisions"—and so forth—"or to take away or diminish any rights or powers now possessed or enjoyed by any governing body, or which are or shall be vested in or exercisable by the inhabitants of any district under any general or special act." The result therefore is, that if the municipal corporation had a power prior to the passing of this act to oppose this bill in Parliament, that power is certainly not—to use the words of the act—"taken away or diminished" by the recent statute.

I now come to the circumstances of the case, and I must say I think it a very strong case, and quite distinguishable from all the cases to which I have been referred; because in this case the corporation had a special series of powers and duties, which were very much interfered with by the bill in question. It is only necessary to say a few words as to the history of the market company and the corporation.

It appears that in 1838 an act of Parliament was passed empowering the corporation to buy lands in the borough of Brecon, and to make markets, and giving them all sorts of authorities and so forth. Then, notwithstanding the power so conferred on the corporation, the market was not made, or not satisfactorily made, and in 1862 an act of Parliament was obtained by a company, authorizing the company, instead of the corporation, to provide a new market place, and transferring the market place and property which the old corporation acquired under the act of 1838, or otherwise, to the company. Then the markets and fairs and the market house, market places, and all the works connected with it, are by the 21st section vested in the company: that is, they are taken away from the corporation. Then certain powers are given to the corporation, which appear to me very important.

By the 43d section the sum of £210 a year is by the act

charged on the market places and the tolls in favor of the corporation, and then by a subsequent section of the act, sect. 65, the company is empowered "with, but not without, the consent of the corporation," to provide and maintain slaughter houses: and then by the 80th section, the company are not at any time to lower, *raise, or alter any [225 of the tolls "without in every case the consent of the corporation."

By the 82d section the company has power to let the markets for three years only. Then the 89th section provides that the company and the corporation may from time to time enter into and carry into effect all such contracts with respect to any of the purposes of the act, and in accordance with the provisions thereof, as they respectively think fit. Then the 90th section saves the rights of the corporation, except where they are expressly taken away.

Well, now, in that position of matters the corporation had both rights and duties; for instance, it was an important power of the corporation that they had a veto on the erection of slaughter houses. Slaughter houses are not agreeable things as a general rule, and no doubt it was considered not desirable to vest in a private company the right to put slaughter houses anywhere they pleased in the town of Brecon. Again, the power of altering the tolls and rates is a very important power as regards the regulation of a market, and that again was not left to the company, but a control was given to the corporation of Brecon.

Under those circumstances, the company, not having the power to use slaughter houses without the assent of the corporation, erected them, and then the corporation refused its assent to the use of the slaughter houses; and to obtain, amongst other things, the right to use the slaughter houses they had erected, the company presented a bill to Parliament; and this bill, which went in the usual way before the Local Government Board in the first instance, contained, amongst other clauses, a power to use the slaughter houses already erected without any consent on the part of the corporation.

Then the bill also proposed that the company should have power to lease the market for ten years instead of three; and it also proposed that they should have power to lower the tolls without the assent of the corporation. Lastly, it proposed that they should be empowered to sell the property of the company to the corporation: and that the corporation should have borrowing powers conferred on it to raise the money to pay for the property.

This bill the corporation opposed, and not altogether un-226] successfully; *because, as regards the slaughter houses, it was ultimately amended by directing that the slaughter houses should be constructed according to plans to be approved of by the Local Government Board.

So that, instead of giving the company power to use the slaughter houses, effect was given to the objection of the corporation that they were not fit for use—for the committee that passed the amendment must have come to that conclusion on the evidence—that they were not fit to be used in their existing condition. That appears to me to have been a very important success—so important that it does not matter whether the corporation did or did not succeed on all of the grounds of their opposition; for on some of the other points they were not so successful.

That being so, is it to be tolerated that an individual, or a private company, shall take away from a corporation the right conferred on it by a private act of Parliament to object to the user of slaughter houses which the corporation considers unfit or improper for use, and shall say to the corporation, “You shall not be entitled to oppose my bill in Parliament; I will pass it in spite of you behind your back”? I think such a decision would be perfectly irrational. Such a privilege is a valuable privilege conferred on a corporation.

Then there is a minor point, but still it is a point of some importance. The corporation has a security on the market rates, amongst other things, for £210 a year. It is a small sum, no doubt; but the corporation has a right to say, You shall not lower the market rates without our consent. Is an individual, or a private company, to take the right to lower the market rates, which may actually diminish the property of the corporation in the £210? Though that is a very small point, it may be a material point.

As regards the keeping up of the market and the welfare of the inhabitants of the town, it by no means follows that lowering the market rates may be beneficial to the town. It may so lower the interest of the company as to prevent the markets being kept in an efficient state; and it appears to me that the privilege or right of the corporation to assent to the lowering of the rates is one which ought not to be in-227] terfered with by any individual or any *company without the corporation having the option of opposing it in Parliament.

Then we come to the third ground, which appears to me very important, namely, that the general power of contract-

ing given by the first act is limited to the purposes of that act.

We have now a new company imposed on the corporation, and a power to buy on the terms fixed by the act, and a power to borrow the money to complete the purchase. I know that is an option, but it is a very serious option. Is not the corporation to be heard as to the reasonableness of the terms? If it is not to be heard this might happen: it might become very desirable to purchase, and although the terms are not fair terms, the corporation, having no other means of purchasing, might be obliged to purchase on those terms. But if the corporation can be heard before the committee of the House of Commons or House of Lords, they may then insist on the terms being fair: they may say, Give us the power, but give it us on fair terms. It seems to me to be the very heart of the interest of a corporation, if I may say so, that as to the terms of purchase they should be entitled to be represented. It is such an interference with a corporation, *quæ* corporation, both as regards its rights and duties, and as regards its property, that I cannot imagine it can be fairly said it is not connected with the purposes for which the corporation exists.

I say nothing about the ten years instead of the three: that is a very small point.

I think I have said enough to show that this is the kind of active interference with the corporation itself, and with its rights, duties, and property, which entirely puts the case out of the class of cases I have been considering. It really comes much closer to the other class of cases, namely, where an action is brought against the corporation to recover from it a part of its property, or to deprive it of a part of its privileges.

It appears to me that, rightly considered, the corporation has by law the right to apply its funds in opposing such a bill as this, and that therefore the information fails, and must be dismissed.

I ought to have noticed before an argument addressed to me about the assent of the ratepayers. I did not notice it for this *reason: it is said a majority of the rate- [228] payers were in favor of the bill. That may have been so; but the corporation is governed by its town council, which is a representative body of all the ratepayers; and I am not aware of any means by which the town council can be controlled by the ratepayers except by the system of not re-electing them when the time comes round; which system is

very likely to be enforced in the present instance if it should turn out that the town council have not acted in accordance with the views of the ratepayers.

Solicitors: *Wilkins, Blyth & Fanshawe*, agents for Cobb & Tudor, Brecon; *Geare & Son*, agents for J. Williams, Brecon.

There would seem to be very little doubt, upon principle, that a municipal corporation is authorized to incur proper expenses in protecting itself against improper or misunderstood legislation, such as paying counsel or others for appearing before legislative committees, and making legitimate arguments upon questions presented.

Yet the authorities seem to be uniformly that it is not: *Minot v. Roxbury*, 112 Mass., 1; *Westbrook v. Deering*, 63 Maine, 231; *Cincinnati v. Cameron*, 33 Ohio St. R., 336; *Henderson v. Covington*, 14 Bush (Ky.), 312; *Frost v. Belmont*, 6 Allen, 152.

But see *Memphis v. Adams*, 9 Heiskell, 518.

There is of course no doubt that this would not include expenses, or money expended in "lobbying."

A municipal corporation cannot incur expenses of celebrating the fourth of July: *Bergner v. Harrisburg*, 1 Pearson, 291, and cases cited; *Hodges v. Buffalo*, 2 Denio, 110; *Gamble v. Watkins*, 7 Hun, 448; *Hood v. Mayor*, 1 Allen, 108; *New London v. Brainard*, 22 Conn., 552; *Boylard v. Mayor*, 1 Sandf., 27.

Nor of entertaining the President of the United States: *Bergner v. Harrisburg*, 1 Pearson, 291, distinguishing *Reynold v. Mayor*, 8 Barb., 597, and *Ketchum v. Buffalo*, 14 N. Y., 356.

Nor has a municipal corporation power to offer a reward: *Patton v.*

Stephens, 14 Bush (Ky.), 324; *Hawk v. Marion County*, 48 Iowa, 472; *Love-land v. Detroit*, 41 Mich., 867; *Cornwall v. Nissonis*, 25 Upper Can. Com. Pl., 9.

Nor to expend money to celebrate the anniversary of the surrender of Cornwallis: *Tash v. Natick*, 10 Cush., 252.

Nor authorize a railway to be laid on one of its streets: *Davis v. Mayor*, etc., 14 N. Y., 506.

But may furnish aid to a policeman injured while on duty: *Logan v. New Orleans*, 26 La. Ann., 101.

A bridge connecting two cities is for city purposes: *People v. Kelly*, 5 Abb. N. C., 363.

A city may borrow fire arms to be used in preserving order: *State v. Buffalo*, 2 Hill, 434.

But has not to assume the defence of actions against its supervisors: *Halstead v. Mayor*, 3 N. Y., 430; *People v. Auditors*, 74 N. Y., 311.

But see *Stillwell v. Mayor*, 19 Abb. Pr. 376.

Nor to permit a permanent obstruction of a street: *N. Y. Cent., etc., v. Utica*, 3 Alb. L. J., 191.

A municipal corporation is liable for rent of offices for its officers: *Butler v. Commissioners*, 15 Kans., 178.

But see *Lynde v. Rockland*, 66 Maine, 309; *French v. Auburn*, 63 Maine, 452; *Davies v. Mayor*, 45 N. Y. Supr. Ct. R., 373.

[10 Chancery Division, 228.]

M.R., Aug. 8; Nov. 9, 1878.

In re BATTERSBY'S TRUSTS.

*Practice—Trustee Relief Act—Payment out of Court—Numerous Parties interested—
Service on absent Parties—Form of Order.*

On a petition under the Trustee Relief Act for payment out of court of a fund to which numerous parties were entitled, most of whom were not before the court, a former order having been made directing class inquiries, and the Chief Clerk having made his certificate, it was ordered that the petitioner be at liberty to serve a copy of the petition, the former order, and the Chief Clerk's certificate, together with the present order, upon the several persons named in the certificate, and that the petition stand over till such persons had been served.

THIS was a petition under the Trustee Relief Act for payment of two equal tenth parts of a fund in court which represented the proceeds of the sale and conversion of the testator's estate, and which, under his will, was divisible into ten equal parts; also for the remaining eight of such tenth parts to be carried over to the proper separate accounts; and that the proper inquiries might be directed to ascertain the persons entitled thereto respectively. The title to two tenths was clear, but the title to the remaining eight tenths could not be determined until certain class inquiries had been made. The person entitled to the two tenths claimed to be entitled to a further share in the remaining eight tenths.

*By an order made on the 8th of August, 1877, cer- [229
tain sums were ordered to be paid out of court on account of the two tenths, and certain class inquiries were directed, and the rest of the petition was ordered to stand over.

On the 8th of August, 1878, the Chief Clerk having made his certificate, the petition again came on.

Chitty, Q.C., and *Cozens-Hardy*, for the petitioner, claimed a further share of the fund in court, but pointed out that the persons named in the Chief Clerk's certificate, who were fifteen in number, and who were interested in arguing the question, were not before the court. The rules and orders contained no provision for service of an order made under the Trustee Relief Act; and the Chief Clerk declined to direct service. Unless they could be made respondents to this petition, there was no way in which they could be brought before the court.

Davey, Q.C., and *Renshaw*; *F. Thompson* and *Woodroffe*, for the respondents.

JESSEL, M.R., ordered that the petition do stand over till the first petition day in Michaelmas Sittings, and that the

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petitioner be at liberty to serve a copy of the petition, the said order of the 8th of August, 1877, and the Chief Clerk's certificate, together with a copy of the present order, upon the persons named in the Chief Clerk's certificate.

1878. Nov. 9. The petition again came on.

The parties served were represented by counsel, and the rights of the petitioner and the respondents and the parties served were declared by the court.

Solicitors: *Sharpe, Parkers & Co.; Shaw & Tremellen.*

[10 Chancery Division, 230.]

M.R., Dec. 6, 1878.

230] *In re SPURWAY'S SETTLED ESTATES.

Settled Estates Act, 1877 (40 & 41 Vict. c. 18)—Petition for Sale—Opposition of contingent Remainderman.

Testator, being entitled in fee to a settled estate, subject to a shifting clause in favor of A. in the event of testator's children dying without issue under twenty-one, and being also seised in fee of another property adjoining and partly intermingled with the settled estate, devised all his real estate to trustees in trust for sale. Testator left four children, the eldest being twelve years old. The trustees presented a petition under the Settled Estates Act, 1877 (40 & 41 Vict. c. 18), for the sale of the two properties together and the apportionment of the purchase-money. A. opposed the sale:

Held, that A.'s interest was too remote to be considered, and the court being satisfied on the evidence that the proposed sale would be more advantageous than if the properties were sold separately, the same was ordered accordingly.

THIS was a petition, under the Settled Estates Act, 1877, by the trustees of the will of John Purlevant Spurway.

The testator was entitled to a defeasible interest in an estate called the Spring Grove estate, consisting of a good-sized house, and nearly 165 acres, under the following title:—

By the will of William Purlevant, who died in 1840, certain powers of sale and exchange were given to his trustees, under which they purchased the said estate, and by an indenture of the 25th of March, 1846, the same was conveyed to the last-mentioned trustees to the uses and upon the trusts declared by William Purlevant's will, and stood limited after the decease of Frances Spurway (daughter of W. Purlevant) and her husband, to the use of all and such one exclusively of the children of Frances Spurway as she should by deed or will appoint, with a gift over in default of appointment.

In 1865 Frances Spurway died, leaving her husband and four children, namely, the said John Purlevant Spurway,

William Henry Spurway, Frederick Spurway, and Edward Spurway, her surviving.

By her will, in exercise of her said power of appointment, she devised the Spring Grove estate (subject to the life of her husband) to the use of her son the said John Purlevant Spurway in fee, but if he should die without leaving any lawful issue, either *immediate or remote, living at [23] her decease, or, leaving any such issue, if such issue should all die under the age of twenty-one years, and no one of them should have any lawful issue living at his or her decease, then to the uses therein declared in favor of her son William Henry Spurway, with remainder on certain events to the uses therein declared in favor of her son Edward Spurway in fee.

On the death of the husband of Frances Spurway, in 1866, John Purlevant Spurway became entitled to and entered into possession of the Spring Grove estate.

John Purlevant Spurway was seised in fee of other freehold lands, consisting of about 300 acres, adjoining or intermingled with the lands of the Spring Grove estate; and in some places he had caused the hedges separating the lands to be removed, and the fields belonging absolutely to him to be thrown into one with the fields forming part of the Spring Grove estate.

John Purlevant Spurway, by his said will, dated the 12th of August, 1877, devised all his real estate to the present petitioners upon trust for sale. He died on the 14th of August, 1877, leaving four children him surviving, namely, three boys and a girl, the eldest, a boy, being now twelve years old, and the youngest two years old.

The petitioners alleged that it would be for the advantage not only of the persons interested under the will of J. P. Spurway, but of all other persons interested in the Spring Grove estate, that the same should be sold together with the lands to which J. P. Spurway was absolutely entitled, and that they would realize more if sold together than if sold separately, and prayed that the same might be so sold and the purchase-money apportioned.

The petition was served on William Henry Spurway and Edward Spurway.

Evidence was adduced on behalf of the petitioners to show that the value of the estate would be depreciated if the properties were sold separately, and contrary evidence was adduced on behalf of William Henry Spurway, who opposed the sale.

Davey, Q.C., and *Whitehorne*, for the petitioners, sub-

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mitted, on the evidence, that it would be for the benefit of 232] all persons *interested in both properties if they were sold together, and the purchase-money apportioned.

Chitty, Q.C., and *Dryden*, for William Henry Spurway : We submit that William Henry Spurway, being entitled to a contingent interest in the Spring Grove estate in the event of the four children of John Purlevant Spurway dying under twenty-one, and without leaving issue, he has a sufficient interest in the property to justify him in opposing the proposed sale. According to our evidence the properties would sell to more advantage separately. Besides, no adequate reason is assigned for the sale : it is a family mansion house and estate which was occupied by the testator, and the respondent would prefer its remaining unsold, as it may, possibly, devolve upon him. We submit his interest is not too remote, and that the estate should not be sold without his concurrence : *Ex parte Taylor* (*).

Skinner, for the other respondents.

JESSEL, M.R. : The ground upon which I decide this petition is very simple—not that the opponent might not have had something to say if he had had sufficient interest to be considered—but that I think I may safely and properly disregard him.

There is no doubt that, according to the view of the petitioners, and according to my own view, it is more advantageous to sell the two properties together than to sell either of them alone ; and, therefore, if I regard the evidence of those who are represented by the petitioners, it is obvious to my mind that it is more advantageous to sell as they ask, namely, as an entire estate. If the properties are sold separately, then you have a large house or mansion with only 165 acres of land. The testator occupied with that land about 300 acres more, making nearly 500 acres. If I sell a good house—or mansion if you like—and nearly 500 acres of land, I sell a very eligible residential property. If I sell such a house—the larger it is the worse for this purpose—with only 165 acres, and sell away the other land, it 233] appears to me it is not so likely to *obtain an advantageous price. In my opinion it is very beneficial to the owners of the fee simple to sell the two together. Of course I can arrange an apportionment of the price by a reference to chambers. It is suggested that it is a family mansion, but in fact it is not. The whole property consists of a house and 165 acres, which were purchased in the year 1846, so that the whole is not sufficiently large to entitle it to be

(*) 1 Ch. D., 426.

called a family mansion in the sense that there is anything in the shape of *pretium affectionis* at all. It is quite out of the question. It is nothing more than a residence which one or two members of the family want.

Then the next objection is that the contingent remainderman says he should like to keep it. No doubt his views and wishes are to be attended to in a proper case, but the answer is, that this is not a proper case. His interest is so remote that the court ought not, in dealing with this property, to regard his views and wishes to the detriment of the petitioners, who have a substantial interest in the property. How does it stand? It belonged to the testator in fee simple, subject to a gift over if he died without leaving issue living at his death, which has not happened, or leaving any such issue they should all die under twenty-one, and no one of them should leave any lawful issue living at his or her death. What is the present state of the family? He has left four children, three boys and a girl; the eldest is a boy twelve years old, and the youngest is two years old. It is a shocking thing to contemplate that all these four should die under twenty-one. There is, besides, the possibility of the girl marrying and dying under twenty-one and leaving a child. It is not impossible, of course, but very remote, in my opinion—far too remote for me to consider the interests of the remainderman as substantial for the present purpose.

I had a case of this kind before me some time ago, in which I also made an order. That was a case of strict settlement. In my opinion there is no difference between this and a case of strict settlement. As far as the interests of the remainderman are concerned, his chance of getting possession is exactly the same. In that case there were four tenants for life with remainder to their children in tail, and in default of issue, over. The position of the tenant in remainder would certainly not be better than this one. In my *opinion there is no substantial distinction. It does [234 not matter whether a gift is on the dropping of four lives without any leaving issue living at their death, or on the dropping of four lives with failure of their issue. Therefore I look upon this respondent as strictly in remainder. That being so, I think I may safely and properly disregard his interests, and make the order as asked.

The question of apportionment will go to chambers. The respondent will have liberty to attend in chambers: the apportioned price of the settled property to be paid into court.

Solicitors: *Robinson, Preston & Stow; Kingsford, Dorman & Kingsford.*

[10 Chancery Division, 235.]

V.C.M., Jan. 11, 1879.

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*HIGGINSON V. HALL.

[1878 H. 271.]

*Practice—Affidavit of Documents—Next Friend—Rules of Court, 1875,
Order xxxi, r. 12.*

Where a plaintiff of unsound mind sues by a next friend, the defendant is entitled to an affidavit of documents made by the next friend or by some one acquainted with the facts.

THIS was an action by Mary Higginson, a person of unsound mind, suing by James Morris, her next friend, against Joseph Hall; in which the plaintiff alleged that she had placed considerable sums of money in the hands of the defendant, and claimed an account and payment of the amount found due. The defendant delivered a statement of defence denying many of the allegations in the statement of claim, and denying that anything was due from him. The defendant applied by summons for discovery of documents by the next friend, but the summons was dismissed in chambers.

The defendant now moved that James Morris, the next friend of the plaintiff, might be ordered to make and file a full affidavit stating whether the plaintiff had or had had in her possession or power any and what documents relating to the matters in question in this action, and accounting for the same; and that all further proceedings in this action might be stayed until the next friend had made the affidavit.

Bristowe, Q.C., and Cozens-Hardy, for the defendant: A defendant has a right to know what documents the plaintiff has, and cannot lose that right because the plaintiff happens to be of unsound mind. *Hardwick v. Wright* (1) seems against the defendant, but there the alternative of a stay of proceedings was not asked for. Where a plaintiff cannot make an affidavit, the proper course is to stay proceedings until some competent person has made the affidavit: *Prioleau v. United States of America* (2); *United States of America v. Wagner* (3); *Princess of Wales v. Earl of Liverpool* (4); *Republic of Liberia v. Roye* (5). The next friend has chosen to institute these proceedings, and why should he not make an affidavit?

Glasse, Q.C., and Field, for the plaintiff, did not dispute

(1) 11 Jur. (N.S.), 297.

(4) 1 Sw., 114.

(2) Law Rep., 2 Eq., 659.

(5) 1 App. Cas., 139; 14 Eng. R., 44.

(3) Law Rep., 2 Ch., 582.

that there must be an affidavit of documents, but who was to make it, and could the court make the order? Order xxxi, rule 12, only mentions a "party," and a next friend is not a party.

MALINS, V.C., said that he should decide on broad principles that the defendant was entitled to an affidavit of documents by the next friend, or by some one on behalf of the plaintiff, in the same manner as was done in *Republic of Liberia v. Roye*; and made an order that the next friend should make an affidavit of documents. The costs of the application to be costs in the action.

Solicitors: *Field, Roscoe & Co.; Sharpe, Parkers & Co.*

[10 Chancery Division, 236.]

V.C.M., Nov. 19, 25, 1878.

ELLIS V. HOUSTOUN.

[1878 E. 212.]

Will—Construction—All the Children of A. and B.—Exclusion of illegitimate Children.

A testatrix gave a sum of stock to trustees to pay the dividends to her brother Charles and his wife Elizabeth for their lives, and after the decease of the survivor, the capital to be divided between all the children of her brother. The brother had three children by his first wife, two children by his second wife Elizabeth before marriage, and one child after marriage, which were facts well known to the testatrix, who promised, as the claim alleged, that if he married his wife Elizabeth she would provide for all his children by her, and she in fact treated all the children equally as her nephews and nieces, and it was further alleged that the testatrix gave instructions that her will should be so drawn as to provide equally for both classes of children, and that she believed such to be the effect of the words of the [237 will:

Held, upon demurrer, that the illegitimate children must be excluded from the bequest; and that the words of the will being distinct, no extrinsic evidence could be received to show what the intention of the testatrix was.

Laker v. Hordern (1) commented upon.

THIS case came on upon demurrer. The allegations in the statement of claim were as follows:—

The testatrix made her will on the 21st of August, 1856, and thereby bequeathed a sum of £26,977 £3 per Cent. Consols to trustees upon trust "to pay to or permit and suffer my brother Charles Streater Ellis to receive the interest, dividends, and annual income thereof, for and during the term of his natural life, and after his decease to pay to or permit and suffer Elizabeth Ellis, wife of the said Charles Streater Ellis, to receive the interest, dividends, and annual

(1) 1 Ch. D., 644.

income for and during the term of her natural life, and after the decease of the survivor of them the said Charles Streater Ellis and Elizabeth his wife, to pay, assign, and transfer the said sum of £26,977 £3 per Cent. Consols, and the interest, dividends, and annual income thereof respectively, unto and equally between and amongst all and every the children of the said Charles Streater Ellis who shall be living at the death of the survivor of them the said Charles Streater Ellis and Elizabeth his wife, and the issue of such of them as shall be then dead."

The testatrix died possessed of considerable property in the year 1868. Charles Ellis was married twice. By his first marriage he had three children; he was secondly married to Elizabeth Ellis in March, 1857, but previously to their marriage they had lived together as husband and wife, and had two children, viz., the plaintiff Frederick Ellis, who was born in 1832, and James Ellis, who was born in 1837. The claim stated that the plaintiff and his brother James were always recognized by their father as his children, and they were baptized as such. The testatrix was always on the most affectionate terms with her brother Charles Ellis, and she made him a yearly allowance, but she very strongly remonstrated with him on the impropriety of his conduct in living with Elizabeth Ellis without being married to her, and she finally refused to further communicate with him unless 238] *he married Elizabeth Ellis. She told him, however, that if he did marry she would provide for his children by Elizabeth Ellis. Thereupon the marriage took place between Charles Ellis and Elizabeth Ellis, and they had one more child who was born in December, 1857. The testatrix thenceforward continued on the most intimate and affectionate terms with Charles Ellis, and the two illegitimate children, who were treated by her as being her actual and legal nephews. She very frequently invited them to her house, and made no distinction between them and her lawful nephews and nieces, and spoke of herself as their aunt, and of them as her nephews. Previously to her will she constantly stated and promised to Charles Ellis and to the plaintiff that she should provide by her will for the plaintiff and his brother James Ellis, and subsequently to her will she repeatedly, down to the time of her death, told Charles Ellis and the plaintiff that by her will she had provided for the plaintiff and James Ellis, and had made no distinction between them and their brother and sisters. The testatrix, when she made her will, intended thereby to provide for the plaintiff and James Ellis, and gave instructions to that effect,

and fully understood that the language in which the bequest was expressed was sufficient to identify the plaintiff and his brother, and to include them among the children of Charles and Elizabeth Ellis. Louisa Ellis, one of the legitimate children of Charles Ellis, married Mr. A. Blake, a brother of the defendant Frederick J. Blake, one of the executors of the will, who was a member of the firm of Wordsworth, Blake & Co., the solicitors of the testatrix, who prepared her said will.

Elizabeth Ellis died some years since, and Charles Ellis died in August, 1878.

The plaintiff claimed that the trusts of the will as to the £26,977 might be declared and carried into effect by the court, and that the plaintiff might be declared entitled to one-sixth part of the said legacy.

J. Pearson, Q.C., and *Decimus Sturges*, in support of the demurrer: This case is entirely governed by *Dorin v. Dorin*⁽¹⁾. The *circumstances of that case were very [239 much stronger than they are here, because the testator there made his will the day after his marriage, and gave his property to his wife for life and then to his children by his wife, he had had two illegitimate children by her who were baptized in his name, and there never were any other children after the marriage. That case distinctly laid down the rule that where there are, or may be, legitimate children to answer the description, illegitimate children cannot take. The words of this will are distinct, and no evidence of surrounding circumstances can be admitted to explain them. *Dorin v. Dorin*⁽¹⁾ was followed by Vice-Chancellor Hall in *In re Ayles' Trusts*⁽²⁾, which was a strong case in favor of the illegitimate children.

Higgins, Q.C., and *S. Brice*, for the plaintiff: The circumstances here are all in favor of the testatrix's intention being to include the illegitimate children, and it is alleged that the testatrix believed when she made her will that the words were sufficient to carry out that intention. It is alleged that the marriage of Mr. and Mrs. Ellis took place in consequence of the promise by the testatrix that if they did marry she would provide for the children of her brother by Elizabeth Ellis. Under these circumstances, the court will admit extrinsic evidence to show that the testatrix intended to include the two illegitimate children. In *Crook v. Hill*⁽³⁾ Lord Justice Mellish said it was clearly settled by authority that the word "children" might by force of the context

⁽¹⁾ Law Rep., 7 H. L., 568; 13 Eng. Rep., 90.

⁽²⁾ 1 Ch. D., 282; 15 Eng. Rep., 741.

⁽³⁾ Law Rep., 6 Ch., 811.

carry the property to a class including both legitimate and illegitimate children. We therefore ask the court to take into consideration the surrounding circumstances to show what the intention was. In the case of *Laker v. Hordern* (¹), where the bequest was to "all and every my daughters," Vice-Chancellor Bacon there held that the illegitimate children of the testator took the legacy, although at the time the testator was married and might have had legitimate children to answer the description. His Lordship there admitted evidence as to the surrounding circumstances, and he said that *Dorin v. Dorin* had no application where it was necessary to have recourse to extraneous evidence. *In that case *Wilkinson v. Adam* (²) was strongly relied on. In *Grant v. Grant* (³) evidence was admitted to show the meaning of the testator. There Mr. Justice Blackburn said: "The court in construing the language of a testator may properly take into account all that he knew at the time, in order to see in what sense the words were used."

Then with regard to the testatrix believing that she had given the property to the plaintiff and his brother, it must be recollected that the will was prepared by a relative of a person who would benefit by the illegitimate children being excluded, and there are cases to show that it is the duty of a solicitor under such circumstances to show that the testatrix fully understood the effect of what she was doing: *Bulkeley v. Wilford* (⁴); *Segrave v. Kirwan* (⁵); *Allen v. Macpherson* (⁶); *Kennell v. Abbott* (⁷); *Kerrick v. Bransby* (⁸); *Marriott v. Marriott* (⁹); *Fulton v. Andrews* (¹⁰).

Everitt, in support of a second demurrer by another defendant.

MALINS, V.C.: I am clearly of opinion that I must allow this demurrer. Upon the statements in the claim nothing can be more clear than that it was the intention of this testatrix that after the death of her brother and his wife, each of whom are made tenants for life, that all the brother's children—that is, all the children by the first wife who were legitimate—and all the children by the second wife, whether legitimate or illegitimate, were to be the objects of her bounty and were to take. That that was the case, the circumstances admit of no doubt whatever. One cannot help regretting that where money is concerned it is so much the rule to

(¹) 1 Ch. D., 644.

(²) 1 V. & B., 422.

(³) Law Rep., 5 C. P., 727.

(⁴) 2 Cl. & F., 102.

(⁵) 1 Beatt., 157.

(⁶) 1 Ph., 133.

(⁷) 4 Ves., 802.

(⁸) 7 Bro. P. C., 437.

(⁹) 1 Str., 666.

(¹⁰) Law Rep., 7 H. L., 448; 12 Eng. R., 76.

overlook moral obligations. I take the same view of this case as Lord Loughborough did in the case of *Cartwright v. Vawdry* (¹), which, if possible, was a much harder case than this; for there the testator left the property equally amongst his children. He had four daughters, and nobody knew that one of them was illegitimate. *She lived [241 with him just as one of his daughters; he treated her as his daughter, and he intended her to take; but it turned out that she was illegitimate, whilst her three sisters were legitimate. The question there was whether under the description "children" the illegitimate daughter could take. Lord Loughborough, then Lord Chancellor, says: "This is a very unfortunate case. I have no doubt of the intention, but how can I possibly put upon the will the construction the plaintiff desires, when there are lawful children? The family will act very honorably and conscientiously by giving way to the disposition which is stated; but it is impossible in a court of justice to hold that an illegitimate child can take equally with lawful children upon a devise to children. Mr. Vawdry's evidence increases the regret. When the testator placed such confidence in him, it was very wrong not to follow his advice. If he had named this daughter, it would have done."

Indeed, if the doctrine which has been urged upon me on behalf of the plaintiff were to be acceded to, it would be impossible for any family upon the death of a testator to know what their rights were; for there would have to be an inquiry whether he did intend illegitimate children to take, and how many illegitimate children he had. Who is to ascertain that? You would have to go into an inquiry to ascertain whether he meant illegitimate or legitimate children.

Now, I may say I believe the law is firmly settled, and was settled long before any of us came into existence, that where you have a bequest of property to a class of persons, children, nephews, or nieces, or any class you like—"I give to my children," "I give to my nephews and nieces," or "I give to my brothers and sisters," and you find in the class designated legitimate members—you never can admit illegitimate persons to share with them. Therefore in all cases where a man says, "I give to A. for life and after his decease to his children," if there are legitimate children to be found answering that description you cannot go any further, and you cannot admit illegitimate children to share with them; and that case of *Cartwright v. Vawdry* (¹) is the recognized authority, and has been

(¹) 5 Ves., 530.

acted upon ever since ; and indeed the same principle was acted upon long before that case.

242] *Then it is suggested that I am not to read this will as I find it ; that the will was not prepared by the testatrix, but by somebody else, and that therefore I am to hear what that somebody else says was the intention of the testatrix, instead of looking at the will itself. The law is so clear that it does not admit of any such contention. I must look at the will itself ; I cannot go from the words which are used in the will. We can never go behind a will to construe it. The words to be found in the will, whoever prepared it, became the words of the testatrix as soon as she executed the will. Therefore how can I go into an inquiry to see what this lady intended by "children" ? Suppose—to put the illustration which Mr. Brice gave—a man says, "I give my property to my son John," and there is another son, William, and it is beyond all possibility of doubt that he did not intend John to take, you cannot allow William to take, because there is a son John who answers the description ; but if he says, "I give to my son John," and there is no son John, then that ambiguity is explained away by parol evidence. Upon the same principle a gift to a child is not a gift to an illegitimate child in the eyes of the law ; and therefore when you find a person who does strictly answer the description in the will, you do not try to find out anybody else who does not answer the description, because, directly you find persons answering the description, the words are satisfied, and you require no parol evidence to see what was intended. If that were admitted no man would be safe in making his will.

Now it has been urged upon me that *Dorin v. Dorin* (¹) did not decide what it did decide. In *Dorin v. Dorin* there was no legitimate child, and in *Crook v. Hill* (²) there was no legitimate child. In the case before Vice-Chancellor Bacon, *Laker v. Horder* (³), where the testator gave his property to his daughters, there were illegitimate and no legitimate daughters. I challenged the plaintiff's counsel to give me any case, from the earliest to the latest period, in which, where there are legitimate children, illegitimate children have been allowed to answer the description of children. No such case has been produced, because there is no such case to be found. Now what was really decided 243] in *Dorin v. Dorin* ? That case was *argued before me, and I gave judgment upon it. There I thought myself

(¹) Law Rep., 7 H. L., 568 ; 1 Eng. R., 90.

(²) Law Rep., 6 Ch., 311.

(³) 1 Ch. D., 644.

fully warranted, upon the authorities, in coming to the conclusion I did, because there was no legitimate child to answer the description in the will at the death of the testator, and there were two illegitimate sons who had been brought up by the testator as his own children, just as if they had been born in wedlock and he had them baptized by his name, and had told the Roman Catholic priest that they were his children; yet, because the testator had married the mother of those children the day before his will was made, the House of Lords came to a conclusion against the illegitimate children; and for what reason? Because, a marriage having taken place, it was possible that legitimate children might be born to answer the description; and therefore, when there are or may be legitimate children to answer the description, illegitimate children will not take. That was carrying the doctrine, I think, further than it has ever been carried before. I can only say, in common with most persons, that it is a result which anybody may regret; Mr. Pearson, who argued the case, admits that he never had a shadow of doubt that illegitimate children were intended, and yet it is the rule of law that you cannot let illegitimate children take where there are or may be legitimate children, and therefore illegitimate children are excluded.

Then there is the case of *Crook v. Hill* (¹); that case was very much relied upon. There there were no legitimate children to answer the description. The circumstances were peculiar. The testator had two daughters, one of whom had been the wife of Crook. She died, and the husband then married his late wife's sister, that is, another daughter of the testator, with his approbation. By his will the testator called Crook, who had married the two daughters in succession, his son-in-law. No doubt he was the testator's son-in-law, because he legitimately and properly married his first daughter; but the Court of Appeal and the House of Lords came to the conclusion that, under the extraordinary circumstances of that case, there being no legitimate child to answer the description (and I am perfectly satisfied that if there had been a legitimate child to answer the description the illegitimate children would have been excluded), the court was warranted, under all the existing *circum- [244 stances, in ascertaining what was intended. Therefore that was a case in which the illegitimate children took, because there was no legitimate child to answer the description.

Then, again, there is a case which was before Vice-Chan-

(¹) Law Rep., 6 Ch., 311; Law Rep., 6 H. L., 265; 7 Eng. R., 1.

cellor Hall, *In re Ayles' Trusts* ('), which is the same as *Dorin v. Dorin* ('). That is a remarkable case, and the Vice-Chancellor, in my opinion, most properly held that inasmuch as there was a legitimate child to answer the description, illegitimate children could not take.

In the case of *Laker v. Hordern* ('), which has been much pressed upon me, the testator gave his property to his daughters, and there were none except illegitimate daughters. That was a case in which there were no legitimate children to answer the description, and therefore Vice-Chancellor Bacon, in some way or other (I do not exactly understand how), got over *Dorin v. Dorin*, although it was strongly pressed upon him. There the testator was married, and the gift was, "I give to my daughters," and according to *Dorin v. Dorin*, inasmuch as he might by possibility have had legitimate daughters who would take, it might very well have been decided that illegitimate children were excluded; but, however, I am very glad Vice-Chancellor Bacon was able to satisfy himself that in that particular case he could decide in favor of the illegitimate daughters, because that effected the intention of the testator. As far as I know, there was no appeal, because the good sense and good feeling of the parties allowed them to acquiesce in the daughters' taking, and they were evidently intended by the testator to do so. But I am bound to say that if that case had come before me, I should have come to an opposite decision, because when the circumstances are such as to show that there are or may be legitimate children, then, according to *Dorin v. Dorin*, illegitimate children would be excluded.

Now I believe those are the only cases which have occurred in modern times on this subject; but it is urged that illegitimate children may in some cases take; and so they may, if in the will itself you find something to warrant their taking. If the testator says in his will, "I give a legacy to my son A. and afterwards to his children," and A. is illegitimate, 245] is A. to take under a general bequest to children? Certainly. Because the testator having called him a child in one part of the will, he is to be treated as such in another part of the will. In that case the will itself would enable the court to give it to that illegitimate child.

So, in the case of *Gill v. Shelley* ('), a woman gave her property to the children of Gill, who had two children, one legitimate and one illegitimate, and it was there held that

(') 1 Ch. D., 282; 15 Eng. Rep., 741.

(') 1 Ch. D., 644.

(') Law Rep., 7 H. L., 568; 13 Eng. Rep., 90.

(') 2 Russ. & My., 336.

the gift to children took effect, because it would only satisfy the words in the plural by taking in the illegitimate child. Therefore, where, in consequence of some indication on the will, it is shown that illegitimate children were intended by the testator to take, or where there are no legitimate children to answer the description, then you have recourse to parol evidence to show what was meant, and possibly illegitimate children may take. But where there are legitimate children to take under such description, it is absolutely impossible to come to the conclusion that illegitimate children can take. So far, therefore, as this point is concerned, I must allow the demurrer, on the ground that the plaintiff is one of the illegitimate children, and takes no interest under the will.

Then it is said there is another equity in this statement of claim, which is in these words: "that in accordance with the promises and representations made by the testatrix, she intended to provide for the plaintiff and his brother, and gave instructions to that effect, and she fully understood that the language in which her will was expressed was sufficient to describe and identify the plaintiff and J. Ellis, and to include them among the children of Charles Ellis, and that she died in that intention and belief." So that according to that I am not to look at what the will itself says, but I am to receive parol evidence to show what the testatrix meant by the expression "children." If parol evidence on such a subject as that were admitted, parol evidence could be admitted on any subject. No will could ever be construed, and no one would know what the rights of the parties were under a will. In my opinion there is not a particle of equity in this statement of claim; and therefore I am bound to come to the conclusion which I do. I desire that there should be no doubt whatever on such a subject. I am quite sure that in *Dorin v. Dorin* (') I should not have had any *doubt if Mr. Dorin had had a child born [246 after his marriage. It was only because there was no legitimate child to answer the description that I came to the conclusion I did; but that being overruled, I think, as far as I am concerned, the law must be considered as now thoroughly settled that in all bequests to classes of children, where there are two classes, you cannot admit parol evidence to let in illegitimate children to share in the estate.

Pearson, Q.C., asked for the costs.

MALINS, V.C.: Upon the whole I think, considering the very great hardship of this case, and although the law is,

(') *Law Rep.*, 7 H. L., 568; 13 *Eng. Rep.*, 90.

in my opinion, perfectly clear, yet it is equally free from doubt that these children were intended to take, and I will not give any costs. I think they ought to come out of the estate, but that I have no power to order.

Higgins, Q.C., asked for leave to amend, not so far as the judgment proceeded on the case of *Dorin v. Dorin* (¹), but because the plaintiff might be able upon the second point to show that there were communications which would tend to substantiate a trust. He referred to Order xxviii, rule 12.

MALINS, V.C.: Giving liberty to amend seems to imply some doubt, but if the rules now are that allowing a demurrer to an action is a bar to bringing another action, I will add the words "without prejudice to bringing another action." I allow the demurrer without costs, and as a matter of recommendation, I say that the costs should come out of the estate, but I have no control over the fund.

Solicitors: *E. Beall; Wordsworth, Blake, Harris & Parson.*

(¹) Law Rep., 7 H. L., 568.

See 7 Eng. Rep., 20 note; also elaborate note by Mr. Stewart, the reporter, to *Stewart v. Stewart*, 31 N. J. Eq., 398-408.

It is a rule of construction that, *prima facie*, the term "children" means lawful children, and the statute of descents, by which the property of an intestate is made to descend to and among the children and their descendants, has reference to lawful children only, and does not do away with the common law rule, which prevents illegitimate children from inheriting anything. Prior to the adoption of the statute of 1872, illegitimate children could inherit from their mother only, in case she was unmarried: *Blacklaws v. Milne*, 72 Ills., 505.

But see *Rogers v. Weller*, 5 Bissell, 166.

As a general rule, a devise to "children" without other description means legitimate children; and if the testator has such children, parol evidence cannot be admitted to show that a different class of persons was intended.

It is always proper to look into circumstances *de hors* the will, to ascertain whether there are any persons answering the description of the legatees named in the will.

If there are no such persons, then the

situation of the testator's family may be proved, to enable the court to ascertain the persons intended by the testator as the objects of his bounty: *Gardner v. Hyer*, 2 Paige, 11.

See, however, *Collins v. Hoxie*, 9 Paige, 81; *Cromer v. Pinckney*, 3 Barb. Chy., 466.

The will of S. gave to his "beloved wife Catherine" his dwelling house during her widowhood, if sold with her consent, the proceeds to be invested by the executors, the income to be applied to her use during widowhood, and upon her death or remarriage, the principal to be divided among his "then surviving children."

Various other provisions were made for the benefit of his said wife, who was appointed guardian of the testator's infant children. The will also directed the executors to set apart out of the residue of the estate several sums of \$5,000, according to the number of the testator's children surviving him, to be held in trust for the benefit of each child, and the residue of the estate was given in equal shares to his children, the issue of any child dying before the testator to take the parent's portion. The testator was married to Catherine in 1843, lived with her from that time up to his death, treating her

as his lawful wife, and had by her eight children who were living at the time of his death, five of them were at that time minors. After his death an action was brought by Jane, who claimed to have been married to S. in 1833, to recover dower. Catherine and her children were made parties. Jane recovered judgment. She had two children who survived S. In an action for a construction of the will, held that the word "children" in the will referred to the children of Catherine, and that the children of Jane were not entitled to share in the estate: *Gelston v. Shield*, 78 N. Y., 275, affirming 16 Hun, 148.

See also *Gardner v. Hyer*, 2 Paige, 11.

A testator who had legitimate children by a wife from whom he had been separated many years, and a family of illegitimate children by a woman with whom he was cohabiting at the time he made his will, devised and bequeathed his estate for the benefit of his wife and children. Held, upon the proof, that by "wife and children" the testator meant his illegitimate children and their mother, and that they were

entitled to the estate of the testator as his devisees and legatees: *Powers v. McEachern*, 7 S. C. (N.S.), 290.

Gifts to "my beloved sons," naming three persons, are good, although two of them are illegitimate: *Stewart v. Stewart*, 31 N. J. Eq., 398, and cases cited by reporter in note.

See also *Dickinson's Appeal*, 43 Conn., 491.

Under the provision of the statute of distribution in reference to advancements (2 R. S., 97, § 76), the descendants of a child of an intestate, who died before him, are entitled on the final distribution of his estate, when it consists exclusively of personal property, to the benefit of advancements made by him in his lifetime to his other children, and such advancements are to be taken into consideration in determining the distributive shares. The word "children," as used in said provision, includes all the descendants of the intestate entitled to share in his estate: *Beebe v. Eastabrook*, 79 N. Y., 246, affirming 11 Hun, 523.

[10 Chancery Division, 247.]

V.C.M., Nov. 26, 27; Dec. 2, 3, 1878.

*WELDON V. DICKS.

[247

[1877 W. 245.]

Copyright—Form of Registration—Copyright in "Title"—Right of Republication—Book out of Print—Acquiescence.

In registering the copyright of a book at Stationers' Hall it is sufficient to enter the first publisher, under the trade name of the firm, and the actual proprietor of the copyright at the time of registration, without stating who the first proprietor was, or how the copyright devolved upon the present proprietor.

Copyright in the "title" of a book, as being a material portion of a work, will be protected, although another book published under a similar title may be totally different in form and contents.

The proprietor of a copyright does not lose his right of republication, although the book may have been out of print and obsolete, and of little or no value, for any number of years.

To sustain an allegation of acquiescence in the infringement of a copyright, it must be shown that there was knowledge of the infringement.

THE plaintiff, Christopher Edward Weldon, and the defendant, John Dicks, were book publishers. The plaintiff stated by his claim that in the year 1847 a series of books entitled "The Parlor Library" were issued by Messrs. Sims and MacIntyre, who, as proprietors of the copyright,

registered the series at Stationers' Hall, as required by the act 5 & 6 Vict. c. 45. A great number of books or novels were published in that series, and No. 196 thereof was a book called "Trial and Triumph." That book was first published on the 10th of July, 1854, by Messrs. Newby & Co., who were the proprietors of the copyright thereof; and it was published in the Parlor Library on the 15th of June, 1860, by John Maw Darton, who had become and then was the proprietor of the copyright as well of the Parlor Library series as of the book called "Trial and Triumph," and the title thereof. By an indenture dated the 4th of May, 1876, the copyright in the Parlor Library series was assigned to the plaintiff by John Maw Darton, and No. 196, being the book "Trial and Triumph," was included in that assignment, and an entry thereof had been made by the plaintiff in the registry book at Stationers' Hall. The plaintiff immediately after the assignment to him of the 248] copyright *in the Parlor Library commenced to re-issue the series, and had published a new edition of eleven of the books in such series, and was preparing for publication a new edition of "Trial and Triumph," which would shortly be published by him at the price of 2s., and he had already expended considerable sums of money in advertising the series, and in preparing "Trial and Triumph" for publication. The defendant had recently commenced to issue a series of books or novels under the general title of Dicks' English Novels, and he had since the date of the assignment to the plaintiff of the copyright in the Parlor Library published in such series a novel under the title of "Trial and Triumph" at the price of 6d. The plaintiff alleged that the defendant had continued to publish the last mentioned work with the intention of inducing the public to believe, and he had in fact induced persons to believe, that the book so published by him was identical with that about to be republished by the plaintiff. And the plaintiff claimed an injunction to restrain the defendant from publishing or selling any book or publication with the title of "Trial and Triumph"; and an order for cancelling all plates used about any such publication; and for delivery up of all copies of the book already published by him under that title; and damages for infringement of the plaintiff's copyright in the said title.

The defendant by his statement of defence did not admit that the plaintiff was now the proprietor of the copyright in the series of books called "The Parlor Library," or in the book called "Trial and Triumph," forming one of the said

series, and he denied that there was or could be any copyright in the title thereof. With respect to his own work called "Trial and Triumph," the defendant stated that in the year 1873 the Rev. Henry V. Palmer offered him the manuscript of an entirely original work in the form of a novel with the proposed title of "True to the Core," but before purchasing the work the defendant discovered that the title "True to the Core" had already been used as the title of a drama, and he therefore requested the author to choose another title, and "Trial and Triumph" was then proposed by the author and adopted by the defendant in entire ignorance that it had ever been used by any other person or applied to any other work.

*On the 7th of July, 1875, the defendant commenced the publication of that novel or story in a weekly magazine of general literature published by him under the title of "Bow Bells." That magazine had an average circulation of about half a million copies. The publication of the story was completed in about four months. On the 27th of July the defendant commenced the republication of the same story in a monthly magazine, also entitled "Bow Bells," which had a circulation of 80,000 copies, and subsequently the defendant republished the same story in a half-yearly volume of tales, being a collection of completed stories from "Bow Bells."

On the 24th of April, 1877, the defendant, for the first time, published the same story as a separate work, in a series which was being brought out by him under the title of "Dicks' English Novels," at the price of 6*d.*, and with the name of the author printed on the outside sheet. The defendant's work was entirely distinct in its plot and subject-matter from the book entitled "Trial and Triumph" to the copyright of which the plaintiff claimed to be entitled, and was entirely different in form and appearance both from the said first publication, in the year 1854, of the plaintiff's book, which was in fact then issued as a three-volume novel, and also from its present form. The defendant denied any intention to induce the public to believe that his work was the same as that intended to be published by the plaintiff, but he claimed to be entitled to use the said title "Trial and Triumph," and to continue to publish and sell copies of the story under that title. Both before and after the date alleged by the plaintiff as the time of the first publication of his book, more than one book was published by other persons under the same title or one substantially the same. For instance, in 1834, a book entitled "Trials

and Triumphs" was published by Smith, Elder & Co. In the year 1849 a book entitled "Trials and Triumphs" was published by J. W. Grove, and in the year 1866 a book styled "Trial and Triumph" was published by E. C. Crocker.

A preliminary objection was raised on behalf of the defendant, that the plaintiff had no right to sue because he had not fulfilled the requirements of the Copyright Act (5 & 6 Vict. c. 45), and had not entered the particulars of his publication in the form prescribed by the 13th section 250] of the act. The entry in the registry *book of the Stationers' Company was in the following form: "Time of making the entry, 14th of June, 1877. Title of book—'Trial and Triumph.' Name of the publisher and place of publication, Newby & Co., Welbeck Street, Cavendish Square, London. Name and place of abode of the proprietor of the copyright—Christopher Edward Weldon. Date of first publication—July 10, 1854."

Glasse, Q.C., and *Byrne*, for the plaintiff: First: The objection cannot now be taken to the title of the plaintiff to sue, because the defendant is bound, under the 16th section of the Copyright Act (5 & 6 Vict. c. 45), on pleading to an action, to give notice in writing to the plaintiff of any objections on which he means to rely on the trial of such action, and if his objection be that the plaintiff is not the proprietor of the copyright, then the defendant must specify who is the person he alleges to be such proprietor, otherwise he shall not be at liberty to give evidence that the plaintiff is not the proprietor. The burden is thrown upon the defendant of giving notice of an objection to title. He has not complied with that section, and on that ground the objection fails. Secondly: The 13th section is fully complied with. The first publisher's name is given, which enables any person to ascertain the correctness of the entry, and the name of the present proprietor is entered, with the date of first publication and the time of making the entry. Nothing further is required. The proprietor of a copyright is not bound to register his title until he has occasion to sue, and it is sufficient to make the entry the day before he brings his action.

Higgins, Q.C., and *Whitehorne*, for the defendant: We distinctly raise the objection to the plaintiff's title by our defence. The defendant says he does not admit that the plaintiff is now the proprietor of the copyright in the series of books called "The Parlor Library," or in the book called "Trial and Triumph," forming one of the said series, and

he denies that there is or can be any copyright in the title thereof. The 16th section applies to two persons claiming the copyright of the same book, and the issue being raised between them, the defendant is then bound to give notice *of the defence he means to rely upon; but here [251 there are two distinct books owned by different persons. Again, that section does not apply, because the plaintiff in his claim is not content with saying he is the proprietor of the copyright, but he takes upon himself to show how he is the owner; he purports to trace his title from the original proprietor. We say, therefore, that the 16th section does not apply; but if it does, we have done all that is necessary by challenging everything by our pleadings on which the plaintiff relies.

Our objections are, first, that the entry of the name of the publisher as Newby & Co. is not sufficient, but that the names of all the members of the firm should be entered; and it is not correct to enter the name of the first publisher, because the public should be able to go to the present publisher of the book. Then he should also enter the name of the first proprietor, with the devolution of title down to the present proprietor. If it be right to give the name of the first publisher, then there should certainly be an entry of the first proprietor, instead of which they give the name of the first publisher and the last proprietor.

Then we say that they do not now claim what they have registered. They have registered a book under the title of "Trial and Triumph," but they are not alleging an infringement of the copyright in that book which they have registered, but in the title of the book.

[They cited *Cox v. Land and Water Journal Company* (1), *Page v. Wisden* (2), and *Copinger on Copyright* (3).

MALINS, V.C.: In my opinion these objections are wholly unsustainable. I have not now to go into the merits of the case, because objections have been raised to the registration by the plaintiff, and without proper registration no action can be maintained. The question, therefore, is whether there has been a proper registration of the plaintiff's book within the meaning of the provisions of the Copyright Act. It is admitted on both sides that it is not necessary for an author or publisher to register his work in order to be entitled to the copyright. He is the owner of the copyright as *between himself and the rest of the world, although [252 he may have published the work forty years ago and it yet remains unregistered. But by the 24th section of the act he

(1) Law Rep., 9 Eq., 314.

(2) 20 L. T. (N.S.), 435.

(3) Page 68.

is bound to register his copyright before he can maintain any action or suit at law or in equity in respect of any infringement of such copyright. Therefore, before he sues he must register. Mr. Weldon, being well aware of this provision in the act of Parliament, did register this work on the 14th of June, 1877, in the form prescribed by the act of Parliament. In that entry the name of the publishers. and place of abode is "Newby & Co., Welbeck Street, Cavendish Square, London ;" and the name and place of abode of the proprietor of the copyright is Christopher Edward Weldon ; the date of first publication, "July 16th, 1854." That last is a material entry in the register for this reason, that you are bound to register in such a manner that the public may know the day of first publication, in order that they may tell when the copyright will cease by lapse of time. In this case it is said the registration is insufficient, because it does not state who was the original proprietor of the publication. And the question is whether that is necessary.

Now the requisites for registration are prescribed by the 13th section of the act. It is, "After the passing of this act it shall be lawful for the proprietors of copyright in any book heretofore published, or in any book hereafter to be published, to make entry in the Registry Book of the Stationers' Company of the title of such book" (that is admittedly done), "the time of the first publication thereof, the name and place of abode of the publisher thereof." There is but one publication, and not two publications, therefore the name and place of abode of the publisher means the name and place of abode of the person who first issues it.

In this case it is Messrs. Newby, and that is correctly given. It is argued that it is not sufficient to say "Newby & Co.," but that the name of every partner in the firm should be inserted. In my opinion, that is totally unnecessary. Longmans & Co., Walker & Co., or any other name by which a firm is known, is sufficient to insert as the name of the publisher, and "Newby & Co." in this case is quite a sufficient description. In my opinion the only man who can answer the description of "publisher" is the man who first publishes the book.

253] *Then a doubt is raised as to the fourth column, the "name and place of abode of the proprietor of the copyright." It is said that means the original proprietor. I am clearly of opinion that it means nothing of the kind, but that it means the person who is the proprietor at the time the registration takes place. What difference can it make to anybody who the original proprietor was? It may

be material to know who the original publisher is, the object being that a person registering may not pass off a fraudulent entry, but that he shall give the public an opportunity of inquiring of the publisher whether it was a genuine transaction, or whether the date has been fictitiously inserted, and therefore it is required that the name of the original publisher should be given; but it does not mean that the original proprietor, but that the present proprietor should be given. Upon this ground I am of opinion that the registration is perfectly sufficient. Those are the objections taken by the defendant; all of which I think are wholly unsustainable.

With regard to the original proprietorship, it is said you ought to show the devolution of title. The devolution of title stated in the statement of claim is, first, Newby & Co., who assigned to Darton, and Darton assigned to the plaintiff. That is distinctly stated. Now the plaintiff contends: I am not bound to give you all the devolutions of title; it is quite sufficient if I show you I am the proprietor. I am not bound to show my title, because the 16th section of the act prescribes that the defendant in pleading to an action for pirating a book, shall give notice to the plaintiff of any objections on which he means to rely; and if the nature of his defence is an objection to the title of the plaintiff, then the defendant must specify who he alleges to have been the first publisher or proprietor of the copyright therein, together with the title of such book, and the place where such book was first published, otherwise the defendant shall not be allowed at the trial to give any evidence that the plaintiff was not the author or first publisher of the book, or that he was not the proprietor of the copyright therein.

Therefore, it is not sufficient, according to the act, that the defendant should say you are not the author or proprietor, but that he should state who is the author and proprietor, and very fairly so. *The meaning of it is [254 that a plaintiff is not to be taken by surprise by objections to his title which are not raised by the pleadings. A clear *prima facie* case is shown here, and if the defendant had any ground for saying that Mr. Weldon was not the proprietor; that he had not derived his title by assignment from Newby to Darton, and Darton to himself, it ought to have been put forward as an objection under the 16th section, and he should have stated who he conceived was the proprietor. In my opinion every objection which has been taken entirely fails, and therefore the case must proceed upon its merits.

The evidence in the action was all taken *viva voce*.

On behalf of the plaintiff, it was proved that the original novel entitled "Trial and Triumph," when first published in 1854, in three volumes, had a fair sale, and that No. 196 of the Parlor Library containing the same tale, had a sale of between 4,000 and 5,000, but that it had been out of print for some years. That the defendant's book being entitled "Trial and Triumph" was calculated to mislead the public into the belief that it was a reprint of the original story, and that it was customary with publishers, when asked for a book which was published at two different prices to give the purchaser the cheaper edition; consequently that the defendant's book, being published at 6*d.*, might, in many cases, be given to a purchaser who did not specify the particular book required, in preference to the plaintiff's book, if published at 2*s.* Evidence was also given of the sale of the copyright in "Trial and Triumph" by Newby to Darton, and of the sale by Darton to the plaintiff of the copyright in sixty or seventy numbers of the Parlor Library, including "Trial and Triumph;" and, further, that the original novel, when published in 1854, was advertised in the "London Catalogue" of books, which was stated to be a book of general reference in the trade.

The evidence on behalf of the defendant went to show that there was an entire ignorance on his part when "Trial and Triumph" was first published in "Bow Bells" in 1875, that the title had ever been previously adopted. That an advertisement of the contents of "Bow Bells" was sent as the publications appeared, to all booksellers, and the fact ought 255] therefore to have *been known by the plaintiff, but no complaint had been made of any infringement of the plaintiff's copyright till after the publication of the tale in "Dicks' English Novels." That there was no catalogue of books generally recognized by the trade, and that the only proper method of ascertaining whether any particular title had been previously used was by reference to the registry at Stationers' Hall, which did not contain the plaintiff's book until June, 1877. That No. 196 of the Parlor Library had been out of print for at least twelve years, and was now quite unknown in the trade; that the plaintiff had purchased the copyright of this particular number of the Parlor Library for a sum of one guinea only; and that two publications with the title of "Trials and Triumphs," being a colorable alteration of the plaintiff's title, had been published long before the defendant's book was brought out in "Bow Bells."

Glasse, Q.C., and Byrne, for the plaintiff: We have proved our copyright in the book called "Trial and Triumph." We have proved that the original publication in three volumes, and the subsequent publication in the Parlor Library series, produced a considerable profit, and we have a right to republish the work in a separate form whenever we think fit. The title of our book is an essential part of the work, since by that title it is known to the public, and any person wishing to purchase our book and finding another book under the same name would naturally be deceived, and would buy what they considered the cheap edition for 6d. in preference to giving 2s.: *Chatterton v. Cave* (¹); *Metzler v. Wood* (²). We are the first producers of the article, which has become identified with our title, and the defendant has no right to prevent us from having the benefit of the name we have selected: *Singer Manufacturing Company v. Wilson* (³). We made our complaint as soon as the defendant published his tale in a separate form; we were not bound to know all the names of the tales in "Bow Bells," and it is proved that we had in fact no knowledge of the name having been used. Our book was first published in 1854, and the defendant might have known that by reference to the London Catalogue.

**Higgins, Q.C., and Whitehorne*, for the defendant: [256 The plaintiff's claim is rested solely on copyright, and there is no allegation which does not point to copyright alone. Therefore the first question is whether a man can have a copyright in a title—that is, in a mere name—under the Copyright Act. In the case of *Maxwell v. Hogg* (⁴), where an injunction was refused to restrain the exclusive use of the name of *Belgravia* for a magazine, Lord Justice Cairns there said (⁵), "I apprehend, indeed, that if it were necessary to decide the point, it must be held that there cannot be what is termed copyright in a single word, although the word should be used as a fitting title for a book. The copyright contemplated by the act must be not in a single word, but in some words in the shape of a volume, or part of a volume, which is communicated to the public, by which the public are benefited, and in return for which a certain protection is given to the author of the work." These observations exactly meet the present case, where no copyright is claimed in the book published by the defendant, but only in the title used for a totally different book. But we rest

(¹) 3 App. Cas., 488; 24 Eng. R., 364.

(²) 8 Ch. D., 606; 25 Eng. Rep., 517.

(³) 3 App. Cas., 376; 24 Eng. R., 272.

(⁴) Law Rep., 2 Ch., 307.

(⁵) Law Rep., 2 Ch., 318.

our case also on the words of the 2d section of the Copyright Act, which states that the word "book" shall be construed to mean every volume, part or division of a volume, pamphlet, sheet of letterpress, sheet of music, map, chart, or plan separately published; and the word "copyright" is to mean the exclusive liberty of printing or otherwise multiplying copies of any subject to which the word is applied. Therefore you can only have copyright in the product of intellect, and not in a name, which depends on a different principle. They even claim to have all the plates of our book delivered up to be cancelled, when it is only our title that is complained of. The case of *Singer Manufacturing Company v. Wilson* (') applies to trade names, which has nothing to do with copyright; and in the case of *Chatterton v. Cave* (') it was decided that the words of the Dramatic Copyright Act (3 & 4 Will. 4, c. 15) must receive a reasonable construction, and must be treated as implying a substantial and material part of a production. The three words of this title cannot possibly constitute a substantial or material part of the book.

257] *Then we say that the plaintiff's book has been so long out of print that it is obsolete, and we cannot be prevented from adopting a title which is no longer in use. Suppose a man had registered a title thirty years ago, intending to publish a book under that name, surely he would not retain his right whenever he thought fit to appropriate that name, to the exclusion of every one else.

This book is proved to have been out of print for about twelve years; but not only so, it was, in truth, of no value, and the copyright was sold for only one guinea, and the attempt to prevent us from now using the name is utterly frivolous.

But suppose this case were rested on the right to use a trade name, no one ever heard of protection for a trade name which has been obsolete for twelve years.

Then we say that we have acquired the right to use the name by publishing the tale in "Bow Bells" so long ago as 1875. The then owner of the copyright, now claimed by the plaintiff, never objected to our use of the name though it was republished in a monthly and in a half-yearly edition of "Bow Bells." This action was not brought till after twelve months from the time of our publishing our book, and therefore, under the 26th section of the act, the plaintiff is now too late. But, again, we have as much right to the title as the plaintiff has, since before the plaintiff's book

(') 3 App. Cas., 376; 24 Eng. R., 272. (') 3 App. Cas., 463; 24 Eng. R., 364.

was first published in 1854, there was a book with the title of "Trials and Triumphs," of which the plaintiff's name is a mere colorable alteration, and another book with the same title of "Trials and Triumphs" was also published long before ours.

There is not a pretence for saying that the public could be deceived by these two books, which are of a totally different appearance.

Glassey, in reply: The plaintiff could not have registered a title without a book as suggested, because the publication of a book must precede and not follow registration: *Henderson v. Maxwell* (1); *Low v. Ward* (2). The infringement of a title as part of a book was restrained in *Mack v. Pether* (3); *Bradbury v. Beeton* (4). We only ask to have the defendant restrained from adopting our title, and [258 we do not ask for damages nor the destruction of the plates of the defendant's work, but we do ask that the defendant should pay the costs occasioned by his refusal to comply with our reasonable demands.

MALINS, V.C.: The question in dispute arises between two publishers. It appears that in the year 1874 the plaintiff, Mr. Weldon, bought the copyright of a portion of a work called "The Parlor Library," which was a series of volumes consisting partly of original works and partly of works which had been previously published. The particular novel "Trial and Triumph" was originally published by Newby & Co. in the year 1854, in a separate form, in three volumes. It was not an unsuccessful publication, as Mr. Newby states in his evidence; and Mr. Darton, the proprietor of the Parlor Library at that time, thought it worth his while to arrange with Mr. Newby to make it part of that work, and it was published about the year 1860 in the 196th number. Mr. Darton states that he sold from 5,000 to 6,000 copies of that number, and so far from its being unsuccessful, it is in evidence that every copy was sold. There is also evidence to show that the work has been out of print for about twelve years.

Then it appears that in the year 1873 Mr. Dicks, the defendant, who is the proprietor of a periodical called "Bow Bells," published weekly at the price of one penny, was offered a novel for publication, which was considered a good work, and was accepted. The author of the tale, Mr. Palmer, had given to it the title of "True to the Core," but upon its being ascertained that a drama had been brought out under

(1) 5 Ch. D., 892; 22 Eng. R., 540.

(2) Law Rep., 14 Eq., 481; 3 Eng. R., 809.

(3) Law Rep., 6 Eq., 415.

(4) 39 L. J. (Ch.), 57.

that title, Mr. Dicks requested the author to change the title, and the name of "Trial and Triumph" was then adopted. I am satisfied that this was done in perfect ignorance on the part of Mr. Dicks that the title had ever before been used. The work was accordingly brought out in "Bow Bells" under the title "Trial and Triumph," and it was afterwards published in a monthly part of "Bow Bells," and again in a half-yearly publication of the same periodical. Subsequently to this Mr. Dicks republished the [259] tale in a series of books entitled "Dicks' *English Novels." It was in April, 1876, that Mr. Weldon purchased sixty-seven volumes of the Parlor Library, and there was an assignment to him of the copyright in these books from Mr. Darton in consideration of £345. One of the sixty-seven volumes was No. 196, which contained this tale of "Trial and Triumph." He has already published eleven of the numbers, and it is in evidence that he has sold from 50,000 to 60,000 copies of those books; and if Mr. Weldon is correct in stating that there is a profit of about £30 upon every 1,000 copies, it follows that he has made a profit of £1,500 upon the eleven volumes, and therefore it may well be that the republication of "Trial and Triumph" will also be a profitable speculation. It seems that Mr. Weldon had already incurred some expense in preparing this work for republication when he saw the advertisement of "Trial and Triumph" to be published in Dicks' English Novels. A complaint was then made by Mr. Weldon to Mr. Dicks of this assumption of the title of his book, and after some correspondence upon the subject, and after a refusal by the defendant to alter the title of his book, this writ was issued. The matter came before me on the 19th of July upon a motion for an injunction, but I declined to interfere, and I felt then, as I do now, that the dispute might have been readily settled if the defendant would adopt a slight alteration in the cover of his book. No such arrangement, however, was come to, and the plaintiff, thinking that the case might have been disposed of upon interlocutory application, appealed from my decision. That application was unsuccessful, and the case now comes before me upon the hearing.

I have already disposed of the preliminary questions as to the form of registration. It is admitted on both sides that an author may have a copyright in his work without registration; but before an action can be brought, an author is bound, under the act 5 & 6 Vict. c. 45, to register his copyright, and I have decided that the book has been duly registered within the terms of the act.

Then it has been argued that there can be no copyright in a name, and the case of *Maxwell v. Hogg* ⁽¹⁾ has been cited in support of that argument. That case referred to a periodical known as *Belgravia*. Mr. Hogg, in 1863, had registered a periodical *with the title *Belgravia*, but he [260 never published the magazine, and Mr. Maxwell, in ignorance that Mr. Hogg had conceived the idea of this magazine, decided upon publishing a work under the name of *Belgravia*, and he advertised his work to be published on the 1st of October, 1866. Mr. Hogg then thought he would avail himself of his registration in 1863, and would get the start of Mr. Maxwell, so, as described by Lord Cairns, he collected various articles intended for other journals, and put the title *Belgravia* on a magazine which he published on the 23d of September. Having the same title, and published six days before Mr. Maxwell's publication, he thought to stop Maxwell from using the title altogether, and that was the subject of Hogg's suit against Maxwell. Mr. Maxwell also filed a bill against Hogg, seeking to restrain his publication; and in the result both suits were dismissed with costs. Lord Cairns, in that case, expressed an opinion that there could be no copyright in a name. It must be borne in mind that he was dealing with a case in which Mr. Hogg had nothing but the name, and it had not been followed up by any publication; but if he had published one number on the 1st of September under the title of *Belgravia*, it is plain the name would have been protected, as decided in the case of *Bradbury v. Beeton* ⁽²⁾, which referred to "Punch" and "Punch and Judy"; and it is to that sort of case alone to which Lord Cairns' observations are directed. But to say there is no title in a name as part of a publication, newspaper, book, or periodical, is, in my opinion, entirely absurd, and is not worthy of the time which has been consumed in considering it. The title of the book is part of the book; you cannot read any book, or turn over the title-page, without finding that the title is at the commencement of the book, that it is part of the book, and is as much the subject of copyright as the book itself. In this respect the case raises a point of considerable importance to proprietors of copyright and publishers generally. What is the extent of copyright in an author or proprietor of a work conferred by the Legislature? It is plain that every man who publishes a book under a particular name, the name forming part of the book, has a copyright extending to forty-two years, or the life of the author, whichever

⁽¹⁾ Law Rep., 2 Ch., 307.

⁽²⁾ 39 L. J. (Ch.), 57.

261] lasts longest; *therefore the author of "Trial and Triumph," when it was published in 1854, acquired a title for that period.

But Mr. Higgins says, and this has been the great stress of the argument, that this work is out of print, and the trade have forgotten it; and he brings a number of witnesses to prove that the book has been quite forgotten, and that it is, as he expresses it, obsolete; and that, therefore, as the publishers and booksellers had forgotten it, and the public had forgotten it, it was a thing thrown into the dust, of no value, and the defendant was entitled to adopt the name. It is very difficult to see to what extent that argument may be carried. If a man's work is so successful as this was, that in a limited time every copy printed is sold, does he, because he does not think it worth while to go on with the publication, lose his rights? It is something like the proprietor of a theatre who has had a certain piece performed for a great number of times. He goes on with it until the public begin to drop off, and then he substitutes something else. There had been two editions of this work, one in three volumes and the other in the Parlor Library, and the author might very well have said, "I do not think it will answer my purpose to republish this at present; it is out of print, but in due time I will consider whether it is worth my while to republish it." When does a man lose his rights? I asked that question of the learned counsel. Does he lose his right because he does not republish in one, two, three, or ten years? When does it cease? I have not got a satisfactory answer to that question. There was beyond all question a right in the proprietor of that work, a right of property which commenced in 1854, and ordinarily would last till 1896. When did it cease? I am unable to come to the conclusion that there is any particular period at which a man who is entitled to a copyright loses his right. The copies may have been all sold, but he may exercise the right he has of republishing at such periods as he thinks likely to answer his purpose and when he would find purchasers. Therefore it seems to me there was a continuing copyright in Mr. Darton, who was the proprietor before he assigned to Mr. Weldon, and when Mr. Weldon took the assignment in 1876 from Mr. Darton, he acquired a good title to the copyright in this work, and had a right to exercise his judgment as to when and how he would republish it and in what form.

262] *Then Mr. Higgins says the plaintiff lost his right because the works had been published in "Bow Bells";

but was Mr. Weldon bound to read every penny publication? There are hundreds of penny publications in London and the provinces. Is the plaintiff bound to look at these publications to see whether any of the titles of the Parlor Library have been adopted? I think not. He says he did not read "Bow Bells," that he did not know of it; and there is not a shadow of reason for supposing he is incorrect in that statement. But he did know of it when published and advertised in a separate form, and he then comes to stop it. I do not think that the publication in "Bow Bells" can in any way affect Mr. Weldon's rights. There can only be acquiescence where there is knowledge. This court never binds parties by acquiescence where there is no knowledge, though it is true that knowledge and acquiescence is in many cases fatal to parties. But, then, has he acquiesced to his knowledge? The first knowledge he possessed was when he saw the separate publication; and there, again, I had another argument upon one of the sections of the act, which says that the action must be brought within twelve months of the offence being committed. Upon that point my opinion is that it applies only to an action for penalties. But even if it did apply to this, the first offence committed was the publication of the separate volume under the title of "Trial and Triumph." That publication did not take place till April, the action was commenced in June, therefore it is long within the twelve months allowed by the act. The action, therefore, was commenced in due time.

Then, if the right of copyright is not lost by non-publication, or by the book being out of print and being forgotten by many of the trade, what is there in the case to deprive Mr. Weldon of the copyright which he possessed in this work? It seems to me that Mr. Weldon had not lost the copyright; that he was entitled, whenever it seemed fit to him, to republish this work under its original title; and that Mr. Dicks has been wrong in assuming that title. But it is said, and one of the topics suggested in favor of Mr. Dicks is, that being in ignorance, as I am sure he was, of the previous use of the title, he thought he could not be affected by it; but I think he is bound to have the knowledge possessed by persons in his own line of business; and I am clearly *of opinion that I must regard this Booksellers' [263 Catalogue as a thing universal in the trade. All the witnesses state that it is a book in universal use, therefore it does seem extraordinary that when the defendant's reader objected to the title "True to the Core" it did not occur to him to look

at the Booksellers' Catalogue, when he would have found that a book with the title of "Trial and Triumph" had been published by Mr. Newby in 1854. If he had done so this litigation would have been avoided.

Now, therefore, under these circumstances I feel bound to come to the conclusion that Mr. Weldon has the copyright in his work, that he had it when the dispute arose in 1877, that the fact of his having it ought to have been acquiesced in by Mr. Dicks, and that when he remonstrated and required an alteration to be made in the title, Mr. Dicks ought to have avoided the expense of this suit.

All the witnesses agree that the title of a book is a material part of the book, it is a valuable part of it, and the case is illustrated by a reference to Mr. Thackeray's work of "Vanity Fair." Would any one be entitled to publish a book called "Vanity Fair," leaving out the author's name. A person buying the cheap edition would expect to get Thackeray's work, and what a fraud it would be if he had got some spurious thing which was not worth reading. Therefore, as all agree that the title of a book is a valuable property, I cannot admit the argument that a man through standing by loses his copyright, and I am of opinion that the plaintiff has proved his title to the copyright and to the injunction, omitting, as is offered by the plaintiff, that part of the claim which asks for a cancellation of all the plates used by the defendant in publishing "Trial and Triumph."

Now comes the important question as to who is to pay the costs of this suit. In deciding that question one must look to the conduct of the parties which has led to it. I think it is evident that more forbearing conduct on the part of the defendant would have prevented this suit, and that if he had answered the letters addressed to him, or had adopted a more conciliatory course by altering the covers which I as well as the Lord Justices invited him to do, but which he refused to do, this suit might have been avoided. Every modification proposed has been rejected, and he was
264] *determined to fight this case out upon the utterly untenable ground that a man loses his copyright because the book has not been sold for some years; if a man will do this there is no other course to take but to say, that as his conduct has led to this litigation he must pay the costs of it.

There is another observation I may make. It was said that this copyright was bought for a very small sum, even as little as one guinea, but I think a man may give only a guinea for a thing which is very valuable, therefore I cannot accede to the argument that because he buys it at a small

price he should be deprived of the title. The defendant must therefore be restrained from publishing, selling, or offering for sale, any book, other than that of the plaintiff, published in a separate form, intituled on the wrapper "Trial and Triumph." The defendant will pay the costs of the action and the costs of the motion, but not the costs of the appeal.

Solicitor for plaintiff: *Henry Levy.*

Solicitor for defendant: *A. W. G. Bell.*

[10 Chancery Division, 264.]

V.C.M., June 24; Dec. 3, 1878.

PICKEN V. MATTHEWS.

[1876 H. 18.]

Will—Gift to a Class—Gift to Children at Twenty-five—Remoteness.

Testator gave his real and personal property upon trust for the children of his daughters who should live to attain twenty-five. At his death one of his daughters had a child who had attained twenty-five:

Held, that this gift was not void for remoteness, but was a valid gift to such of the children living at the testator's death as should attain twenty-five.

FRANCIS HOOFF, by his will, gave his property, real and personal, to trustees on trust to pay certain legacies and annuities, and continued as follows: "Subject as aforesaid, I direct my trustees to stand possessed of my said trust estate, upon trust for such of the children of my daughter Helen by her first husband (but not her children by her present husband), and the children of my daughter Charlotte, who being sons shall live to attain the *age of [265 twenty-five years, or being daughters shall attain that age or previously marry, whichever shall first happen; and I expressly direct that all such grandchildren shall participate equally without regard to the number of each family." And the testator empowered his trustees to maintain the children out of their expectant shares until they should respectively acquire vested interests in the trust estate.

The testator died in December, 1865. The testator's daughter Helen had at the date of the testator's death three children by her first husband, of whom the plaintiff had attained the age of twenty-five at the date of the testator's death. Charlotte had two children who were infants.

Glasse, Q.C., and *Badnall*, for the children of Helen and Charlotte: The only persons who could take under this gift were ascertained at the death of the testator, so there

can be no remoteness. This case is governed by the decision in *Gimblett v. Purton* ('); *Andrews v. Partington* ('). One of the children within the gift having attained twenty-five at the date of the testator's death, the maximum number of the class was then ascertained, for no child born after one of the class had attained twenty-five could be included in the class: *Whitbread v. Lord St. John* (').

[MALINS, V.C., referred to *Doe v. Sheffield* ('); *Doe v. Over* (').]

The rule is laid down in *Jarman* ('); *Supplement to Lewis on Perpetuity* ('); *Gilbert v. Boorman* ('); *Viner v. Francis* (').

Pearson, Q.C., and *Holland*, for the trustees.

Higgins, Q.C., and *H. A. Giffard*, for the next of kin: This is an indivisible gift to a class, not a severable gift, and therefore, if the gift to any part of the class is bad, that is 266] fatal *to the whole gift: *Leake v. Robinson* ("). The gift is void for remoteness, being a gift to a class, some of which, according to the construction of the will itself, without regard to the circumstances which actually happened, might not have attained the age of twenty-five within the period of twenty-one years from the testator's death: *Griffith v. Blunt* (").

[MALINS, V.C.: That case is very shortly reported considering its importance, and seems inconsistent with the other authorities.]

Hale v. Hale ("); *Smith v. Smith* (").

[MALINS, V.C.: In that case the gift to the class was clearly good, and I cannot see how it could be made bad because, in the event of a possible substitution of issue, which did not occur, the substituted issue might not take vested interests within legal limits.]

In re Sayer's Trust ("). A bad gift cannot be made a good one by looking at the events which subsequently happened: *Porter v. Fox* ("); *James v. Lord Wynford* (").

Glasse, in reply: *Williams v. Teale* (") is an authority that you must look at the family as it existed at the death of the testator: *Mann v. Thompson* ("); *Wilson v. Wil-*

(1) Law Rep., 12 Eq., 427.

(2) 3 Bro. C. C., 401.

(3) 10 Ves., 152.

(4) 13 East, 826.

(5) 1 Taunt., 268.

(6) 3d ed., p. 146.

(7) Page 53.

(8) 11 Ves., 238.

(9) 2 Bro. C. C., 658.

(10) 2 Mer., 363.

(11) 4 Beav., 248.

(12) 3 Ch. Div., 643; 18 Eng. R., 739.

(13) Law Rep., 5 Ch., 342.

(14) Ibid., 6 Eq., 319.

(15) 6 Sim., 465.

(16) 1 Sm. & Giff., 40, 58.

(17) 6 Hare, 239.

(18) Kay, 638.

son ⁽¹⁾; *Scott v. Earl of Scarborough* ⁽²⁾; *Singleton v. Gilbert* ⁽³⁾.

Dec. 3. MALINS, V.C.: I have very carefully considered the cases which have been cited; and the conclusion to which I have come will have the advantage, that it will, I think, carry into effect the intention of the testator.

If the two daughters of the testator had had no children living at his death, the gift would have been void for remoteness; because *it would not be certain that the prop- [267 erty would vest within a life or lives in being and twenty-one years after. But this is a gift to living grandchildren. The testator evidently knew that his grandchildren were in existence, and I must attribute to him knowledge of their ages, knowledge therefore that before his death the plaintiff had attained the age of twenty-five years. Now, the rules of law applicable to this case are, first, that a gift to a class not preceded by any life estate is a gift to such of the class as are living at the death of the testator. The case of *Singleton v. Gilbert* ⁽⁴⁾ proceeded on that footing. There, there was a demise of real estate (subject to a term to secure annuities) to all the children of A., and the heirs of their bodies. A. had two children at the death of the testatrix, and one born afterwards, but before the death of the annuitants. It was held that the afterborn child could not take, though if there had been a precedent life interest, that would have been enough to postpone the period of vesting. Lord Chancellor Thurlow, in giving judgment, says ⁽⁵⁾, "The general principle is that, where the legacy is given to all the children, it shall not extend to afterborn children; but where it is given with any suspension of the time so as to make the gift take place by a fair, or even by a strained construction (for so far some of the cases go) at a future period, then such children shall take as are living at that period. But in this case I can see no circumstance to take it out of the general rule." That is a decision that the devise extends only to those children who are living at the death of the testator. It is a rule of convenience.

The second rule is, that where you have a gift for such of the children of A. as shall attain a specified age, only those who are *in esse* when the first of the class attains the specified age can take. All afterborn children are excluded. This also is a rule of convenience. It was laid down in the case of *Andrews v. Partington* ⁽⁶⁾; and has been followed

⁽¹⁾ 4 Jur. (N.S.), 1076; 28 L. J. (Ch.), 95.

⁽²⁾ 1 Beav., 154.

⁽³⁾ 1 Bro. C. C., 542 n; 1 Cox, 68.

⁽⁴⁾ 1 Cox, 71.

⁽⁵⁾ 3 Bro. C. C., 401.

in numerous cases, of which *Hoste v. Pratt* (¹), and a case before me of *Gimblett v. Purton* (²), are examples. In the latter case I proceeded on the principle that only those who were alive when the first of the class attained twenty-one [268] *could take. The maximum number to take was then ascertained. Vice-Chancellor Wigram, in giving judgment in the case of *Williams v. Teale* (³), makes this observation: "If a testator should give his property to A. for life, with remainder to such of A.'s children as should attain twenty-five years of age, and the testator should die living A., there is no doubt but that the limitations over to the children of A. would be void, *Leake v. Robinson* (⁴); but if in that case A. had died, living the testator, and at the death of the testator all the children of A. had attained twenty-five, the class would be then ascertained, and I cannot think it possible that any court of justice would exclude them from the benefit of the bequest, on the ground only that if A. had survived the testator the legacy would have been void, because the class in that state of things could not have been ascertained." So that he adopts the principle that when once the class to take has been ascertained there is no objection to postponing the vesting to a future period.

Upon the authority of these cases I come to the conclusion that the persons who can take under this limitation are those who were living at the death of the testator. *Viner v. Francis* (⁵), a leading authority on the subject, shows that the same principle prevails whether the parent of the children who are to take be alive or dead at the date of the will. I have already mentioned *Singleton v. Gilbert* (⁶) and *Viner v. Francis*. These cases, as well as *Doe v. Sheffield* (⁷) and *Doe v. Over* (⁸), all show that a gift to a class only embraces those of the class who are living at the death of the testator.

Here there is a gift to such of a class as shall attain twenty-five. The class was ascertained at the death of the testator because one of them had then attained twenty-five. The two infant children of Charlotte Heale who were alive at the death of the testator are entitled to take provided they attain the age of twenty-five years.

The case mainly relied on by the other side was *Griffith*

(¹) 3 Ves., 730.

(²) Law Rep., 12 Eq., 427.

(³) 6 Hare, 239.

(⁴) 2 Mer., 363.

(⁵) 2 Bro. C. C., 658.

(⁶) 1 Bro. C. C., 542 n.

(⁷) 18 East, 526.

(⁸) 1 Taunt., 263.

v. *Blunt*(¹). There Lord Langdale, in giving judgment, said that *the will was really free from ambiguity; [269 the vesting was not to take effect till twenty-five, and therefore the gift was too remote. But the real question was, In whom was the property to vest? Was the class to take ascertained at the death of the testator?

Here I hold that there is a valid gift because one of the children of Helen (by her former husband) had attained twenty-five at the death of the testator; the maximum number to take was, therefore, then ascertained, and the gift in question is not void for remoteness.

Solicitor for plaintiff: *W. Harris*.

Solicitors for executors: *Vizard, Crowder & Co.*

Solicitors for the next of kin: *Park Nelson & Morgan*.

(¹) 4 Beav., 248.

[10 Chancery Division, 269.]

V.C.M., Dec. 5, 1878.

In re ASSOCIATION OF LAND FINANCIERS.

Appointment of Official Liquidator—Creditors.

An official liquidator had been appointed in chambers. Upon motion made on behalf of a very large majority of the unsecured creditors of the company, who alone were interested in the realization of the assets, two creditors were appointed liquidators instead of the liquidator already appointed.

[10 Chancery Division, 273.]

V.C.M., Aug. 1; Nov. 26, 1878.

*Tabor v. Brooks.

[273

[1876 T. 185.]

Discretion of Trustees—"Uncontrolled and Irresponsible."

Where in a marriage settlement the trustees had power to apply the income of the settled fund for the benefit of the husband and wife and their children as they should "in their uncontrolled and irresponsible discretion think proper," the court, while expressing an opinion that the trustees were not acting judiciously, declined to interfere with their discretion, there being no proof of *mala fides*.

By a settlement upon the marriage of the plaintiff, Ada Agnes Tabor, and the defendant, Arthur Tabor, dated the 3d of February, 1868, it was declared that the trustees, Henry Brooks and C. J. Dowell, should hold a sum of £10,000 transferred to them, upon trust to invest and pay the income to Arthur Tabor for life, and after his death, in case his

wife should survive him and there should be a child or children of the marriage, to pay the whole of the income to her for life or until her second marriage, but in case there should not be any child of the marriage, to pay one moiety of the income to his wife for life or until her second marriage; and subject to such trusts the trustees were to hold the fund for the benefit of the children of the marriage, with an ultimate trust in default of children for the husband. And the settlement contained the following clause:—

“Provided always and it is hereby agreed and declared, that it shall be lawful for the said trustees or trustee for the time being, if they or he shall in their or his uncontrolled and irresponsible discretion think proper so to do, raise by the sale or conversion into money of a competent part of the trust premises for the time being subject to the trusts of these presents any sums of money, and to apply the same in the purchase, at such price as the said trustees or trustee shall in such discretion as aforesaid think proper, of the life interest of the said Arthur Clifton Tabor in the dividends, interest, and income of the trust premises to be assigned to the said trustees or trustee for the time being, to be held by them or him upon the trusts and subject to the provisions following, *namely: Upon trust that the said trustees or trustee shall, if they or he shall in their or his uncontrolled and irresponsible discretion think fit, but not otherwise, pay and apply such dividends, interest, and income, or any part thereof, in their or his discretion as the same shall become payable and without anticipation, for or towards the maintenance and personal support of the said Arthur Clifton Tabor and his wife (if any) and children or child or other issue for the time being in existence, whether by his said intended or any future wife, or at the discretion of the said trustees or trustee for or towards the maintenance and personal support of such one or more to the exclusion of the others or other of such objects of the present discretionary trust, in such manner and, if more than one, in such shares and proportions as the said trustees or trustee shall think proper during the remainder of the life of the said Arthur Clifton Tabor, or during such shorter period as the said trustees or trustee in such discretion as aforesaid shall think proper, and shall hold and apply so much of the said dividends, interest, and income as shall not be applied under the discretionary trusts aforesaid upon such trusts and subject to such provisions as the said dividends, interest, and income ought to be held and applied upon and subject to after the decease of the said Arthur C. Tabor.”

The marriage between Mr. and Mrs. Tabor took place in February, 1868, and there had been one child only of the marriage—a son, born in August, 1871. The trustees executed the power of purchasing the life interest of Mr. Tabor in the settled fund, and by an indenture of the 29th of March, 1870, for the considerations therein mentioned paid out of the settlement funds, such life interest was assigned to the trustees to be held upon the trusts in that case provided by the settlement. It appeared that Mr. Tabor had for the last five years been addicted to very intemperate habits, and was frequently intoxicated, and violent in his conduct to his wife, so that it was impossible for her to live with him. Mrs. Tabor was without any means of support, and she had applied to the trustees to exercise the power given them by the settlement in paying a portion of the income of the trust property for her support, but they had refused to do so, and had paid the whole income to the defendant, Arthur Tabor, and all they had given *her were several small sums of [275 money, and they had latterly paid the school expenses of the child.

The action was brought by Mrs. Tabor against the trustees and against Mr. Tabor, claiming that the trusts of the settlement might be executed under the direction of the court, and that the trustees might be restrained from paying the whole income of the trust funds to Mr. Tabor, and that a suitable part thereof might be ordered to be paid for the benefit of the plaintiff.

Hadley, for the plaintiff: Where a discretion is given to trustees to allow maintenance the court has power to interfere and control that discretion. This was done by your Lordship in *Davey v. Ward* (*). These trustees are not exercising their power with discretion, but they are acting in an arbitrary manner. The peculiar power given them by this settlement was evidently intended to protect the wife against the event which has happened, that is, that in consequence of the intemperate habits of Mr. Tabor she is unable to live with him. Here there is a trust to apply the income for the maintenance of the husband and wife, and a discretion is given to the trustees as to the amount to be so applied. It is for the court to say how much ought to be applied, having regard to the circumstances of the case: *Ransom v. Burgess* (*). The same principle may be derived from the cases of *Webb v. Earl of Shaftesbury* (*), where the court controlled the trustees in the appointment of new

(*) 7 Ch. D., 754.

(*) Law Rep., 3 Eq., 773.

(*) 7 Ves., 480.

trustees; from *In re Beloved Wilkes' Charity* (*), where the court said that trustees must exercise their discretion with honesty of intention and with a fair consideration of the subject, and it was the duty of the court to see that the discretion of trustees has been thus exercised; and from *Attorney-General v. Clack* (*) and *Cafe v. Bent* (*).

Vaughan Hawkins, for the trustees: The power given to the trustees is not an ordinary discretion with which the court can interfere, but it is in their "uncontrolled and irresponsible discretion," and in such a case the court never 276] *interferes with the discretion of the trustees. This was laid down distinctly in *Gisborne v. Gisborne* (*); and although in *Davey v. Ward* (*) your Lordship exercised a controlling power where the trustees had a mere discretion as to the amount they should pay for maintenance, yet you there stated that if the power given was "absolute and uncontrollable" you could not interfere.

There is nothing in this case to show that the trustees are not acting fairly and honestly, and to the best of their judgment. There is no pretence for alleging *mala fides* on their part: *Lewin on Trustees* (*).

Dunning, for the husband.

Nov. 26. MALINS, V.C.: Before the marriage took place between Mr. and Mrs. Tabor it was well known that Mr. Tabor (who was then a young man of about twenty-five) had long been addicted to habits of intemperance, but he promised his intended wife that he would reform and lead a life of sobriety, and she, unfortunately for herself, believed him. As might have been expected, however, he soon after the marriage returned to his old habits, and the result has been a life of misery and deprivation to the plaintiff, which has obliged her for the last four years, or thereabouts, to live separate from him; it being impossible, as she says, on account of his drunken habits, that she should live with him. That he has been, and I fear still is, a drunkard of the worst description, is, I think, abundantly proved, and is taken as admitted. The question I have now to decide arises under the marriage settlement of the parties, dated the 3d of February, 1868, which is in a very unusual form—no doubt on account of the then well-known habits of Mr. Tabor. [His Lordship stated the effect of the settlement.]

The trustees having executed the power of purchasing the

(1) 3 Mac. & G., 440.

(2) 1 Beav., 467.

(3) 3 Hare, 245.

(4) 2 App. Cas., 300; 19 Eng. R., 19.

(5) 7 Ch. D., 754.

(6) 6th ed., p. 511.

life interest of Mr. Tabor in the settled fund, the result is that they now hold such of the trust funds as have not been advanced to *Mr. Tabor, under a power contained [277 in the settlement, upon the trusts in that case provided for by the settlement.

It appeared before me upon an application in chambers, that Mr. Tabor is now living in France, that Mrs. Tabor is living in London, wholly unprovided for, and that their son, now rather more than seven years old, is placed at school at Brighton at an expense of about £60 a year, which is paid by the trustees out of the trust funds, and that they were paying the whole of the remaining income, amounting to about £300 a year, to Mr. Tabor, leaving Mrs. Tabor wholly destitute. Being then satisfied, as I am now, that Mr. Tabor has, almost from the time of his marriage, been of such confirmed drunken habits as to justify his wife in not continuing to live with him, I thought a fair application of the £300 a year would be to give it in equal shares to the husband and wife while they continued to live apart.

The trustees, however, who are both brothers-in-law of Mr. Tabor (Mrs. Tabor's brother, Mr. Dowell, having retired in consequence of residence abroad), think that Mrs. Tabor, notwithstanding the circumstances I have mentioned, ought to live with her husband; and, I suppose with the view of compelling her to do so, have paid the whole of the £300 a year to him, and they insist that they have an uncontrollable right to do so, with which the court cannot interfere, and for the purpose of having that point decided the case was brought into court.

The question I have to decide, therefore, is whether the absolute discretion which is vested in the trustees can be controlled by the court.

As a general rule, the court will not interfere with the discretion of trustees where it is fairly and honestly exercised. This was laid down in *Costabadie v. Costabadie* (1) and in *In re Beloved Wilkes' Charity* (2); and many other cases may be referred to to show that. But if they exercise their discretionary power in an arbitrary and unreasonable manner, the court will control them, as I did in *Davey v.*

Ward (3), where trustees capriciously persisted in not letting a father have the whole of a small income for the education and support of his children, though it was urgently needed *on account of his limited means. The authorities on that subject are sufficiently stated in that case, and I need not further refer to them. But here the power [278

(1) 6 Hare, 410.

(2) 3 Mac. & G., 440.

(3) 7 Ch. D., 754.

or discretion is to be uncontrolled and irresponsible, and Mr. V. Hawkins relied upon the decision of the House of Lords in *Gisborne v. Gisborne* (1) to show that such a discretion cannot be controlled by the court. In that case a fund was vested in trustees who were given "an absolute discretion and uncontrollable authority" over its application, and it was held that the court could not interfere with the discretion of the trustees in the application of the fund, always supposing that there was no *mala fides* with regard to its exercise. I think that case is conclusive that under such a power or discretion as this the court cannot interfere with the trustees so long as there is no *mala fides* on their part. Although that case was not cited in *Davey v. Ward* (2), I appear to have taken that view of such a power in the passage of my judgment (3) where I said, "If the discretion of the trustees is to be absolute and uncontrollable, the court will not interfere."

Here, although in the distressing circumstances of the case the trustees would, in my opinion, act more wisely in dividing the fund between the husband and wife than in giving it all to the husband, I cannot attribute any *mala fides* to them in the course they take, and I regret therefore that I am unable to interfere with them.

Solicitors: *W. Stuart; Shoubridge & May.*

(1) 2 App. Cas., 300; 19 Eng. R., 119. (2) 7 Ch. D., 754. (3) 7 Ch. D., 761.

See 25 Eng. Rep., 86 note; 25 Eng. Rep., 799 note.

Where a testator had vested in his trustees a discretion as to the maintenance and education of his infant son, the court refused, upon an interlocutory application, to interfere therewith, though the son, aged eighteen years, disagreed with their proposals: *Flannigan v. Flannigan*, 5 Victorian Law Rep. (Eq.), 272.

The general rule is, that if a father be guardian of his child, he must support the child if of sufficient ability to do so. But if the father is not able to support it, or not able to support it according to its station and expectations, it is within the discretion of the court to allow one, who is guardian of his own child, compensation for the support of the ward out of the ward's estate: *Bourne v. Maylin*, 8 Woods, 724; *Stephens v. Howard*, 32 N. J. Eq., 244.

Where a testator has, by will, made

a provision for the maintenance of his children during minority which, though barely sufficient to maintain and educate them, is very disproportionate to the amount of property coming to them ultimately, the court will not, in the absence of any evidence of mistake on the part of the testator, increase the amount allowed for maintenance: *Osborn v. Osborn*, 6 Victorian Law R. (Eq.), 8.

If a guardian of minors loans money to their mother, on her promise to charge such minors for their support, and to give him the benefit of such charges, and she afterwards refuses to make any charge against them, or to accept any compensation for their support, he is not entitled to an allowance therefor in settling his accounts with them as guardian: *Wyckoff v. Hulse*, 32 N. J. Eq., 697.

An infant entitled under the will of her grandmother to a share of a fund in a suit of *S. v. K.*, partly held by the

master and partly by the trustees, was placed with the plaintiffs, by her father, who promised them £100 a year for her maintenance. He died without having made any payment, and the infant was subsequently removed and placed under the care of the testamentary guardian appointed by her father, who took her to reside out of the jurisdiction. The will contained a clause for maintenance of infants, either directly by the trustees or through their guardians.

The plaintiffs, who had made no demand on the trustees for any payment to them under that clause, filed their bill against them for payment out of the fund in their hands of £100, or such other sum as the court might think fit.

Held, that the bill was not sustainable, but that if it had been, the infant would have been a necessary party.

Where funds are in the hands of trustees, under the direction of the court in a suit, the trustees cannot act with reference thereto, without the direction of the court: *Mitchell v. Tuckett*, 5 Victorian L. R. (Eq.), 81.

A testator devised property for the maintenance of his son and grandchildren, and directed the income of other property to be accumulated during their infancy, and the *corpus* divided on their attaining twenty-one. The testator having sold a portion of the former property, and the son dying shortly after his father, the court made an order for the application of a portion of the income of the latter

property to the maintenance of the infants: *Matter of Higginbotham*, 4 Victorian L. R. (Eq.), 57.

By the terms of his will, a testator bequeathed to a married daughter a specified sum of money, "to be paid to her at such times, in such sums as she may be in need of it; but put it not into the hands of her husband, as I will it to be kept clear from all his claims." Held, in an action by the devisee against the executor, on his conversion of the estate into money, she became entitled to receive of him all of the legacy necessary to supply her reasonable needs; that he was liable to her for interest received by him thereon; and that his final settlement report could be set aside to compel him to account for such interest: *Zeek v. Reid*, 69 Ind., 819.

The testator left his personal property to his wife and daughters; his real estate to his wife during life or widowhood, and upon her remarriage, as to income for his daughters as long as his son was under age, and when he came of age, for him; if he should die under age, for his daughters.

The widow married; and there was no present provision for the son: Held, on application by the trustees to employ part of the income in maintenance of the son, and to raise an apprentice fee, that there was no authority for so construing the will as to imply a provision for his maintenance; application refused: *Matter of McKay*, 2 Victorian L. R. (Eq.), 105.

[10 Chancery Division, 279.]

V.C.M., Dec. 14, 1878.

*PETER V. STIRLING.

[279

[1878 P. 74.]

Administration—Colonial Duties—Pecuniary and Residuary Legatees.

A testator whose assets consisted partly of personal estate in the colony of Victoria, where duty is payable on the property of all deceased persons, died domiciled in England, and by his will gave many pecuniary legacies, and divided the residuum among some of the pecuniary legatees:

Held, that the duties attaching in Victoria, and all expenses of realization were payable out of the general estate before distribution, and that the pecuniary legatees were entitled to their legacies free of all colonial duties and expenses except the English legacy duty.

JOHN PETER, formerly of the colony of New South Wales, but at the time of making his will domiciled in England, by his will, dated the 29th of March, 1876, appointed the defendants executors and trustees thereof, and after making divers specific bequests and bequeathing to his wife an annuity of £2,000 a year, the testator gave various legacies for the benefit of his sisters, nephews and nieces, and he gave the residue of his real and personal estate to trustees with directions to sell and convert, and the testator directed that the net residue should be divided among certain of the pecuniary legatees in the same proportions in which they took the total amount of the legacies of gross or capital sums therein before bequeathed to them.

The testator died in January, 1878, and at his death was seised and possessed of real and personal estate to the value of about £700,000 in Great Britain and in the Australian colonies of New South Wales, Victoria, Queensland, and South Australia. The real and personal estate in Victoria was liable to a duty to the government of that colony. Questions had arisen in regard to the administration of the testator's estate, and in particular as to the persons by whom the said duty payable in Victoria ought to be borne, and the plaintiffs' claim was for the administration of the estate.

For the residuary legatees it was contended that the Victorian duty, which was estimated at £2,800, was payable by 280] each legatee *on the same proportion of his legacy which the assets in Victoria bore to the whole assets.

For the legatees and annuitants not participating in the residue it was contended that the whole of the duty payable in Victoria should be paid out of the residue as part of the necessary expenses of obtaining possession of the property in that colony, and of converting and remitting it to this country, where the estate had to be accounted for in this action, and where legacy duty had to be paid on the whole fund.

It appeared that there were no probate or succession duties in the colonies of Queensland or New South Wales, but there was a duty on the estates of the deceased persons in the colony of Victoria. That duty was calculated upon the final balance appearing upon the statement brought in by the executor or other person required to specify the particulars of the estate, after deducting the amount of the debts due by the deceased. The duty varied according to the value of the testator's assets, and where such assets did not exceed £30,000 the rate of duty was £5 per cent., if over £30,000 and under £40,000 the duty was £6 per cent., and if

over £40,000 and under £60,000 the duty was £7 per cent., but in the case of a widow of any testator being entitled under the will, the duty was to be calculated so as to charge only one-half of the percentage thereinbefore mentioned upon property devised or bequeathed to the widow. And by the act of the Victoria Legislature, 1871, No. 388, under which the duties were chargeable, it was provided—Sect. 10: "The duty payable under this act shall be deemed to be a debt of the testator or intestate to Her Majesty, her heirs and successors, and shall be paid by any executor or administrator with the will annexed out of the personal estate of the testator after payment of the testamentary and funeral expenses in priority to all debts of the testator, and if the personal estate be insufficient to pay such duty, the executor or administrator with the will annexed, or any person interested, may apply to the Supreme Court, which may order that a sufficient part of the real estate of the testator may be sold to pay the said duty, the costs of such order and sale and consequent thereon." Sect. 11: "Every executor or administrator, or administrator with the will annexed, shall deduct from each and every devise, bequest, and legacy *coming to any person under any will, an amount [281 equal to the duty upon such devise, bequest, or legacy, calculated at the same rate as is payable upon the estate under this act, unless the testator shall have made a different disposition as to the payment of the said duty in his will." Sect. 12: "No probate, letters of administration, or rule to administer, shall issue from the Master's office until the duty or fee, as the case may be, under this act has been paid, and the Master or officer shall certify by indorsement on every probate, letters of administration, and rule to administer issued, that the duty or fee has been paid, and the amount thereof; and no probate, letters of administration, or rule to administer shall be receivable in evidence in any court of justice unless it shall bear such indorsement." And it was further enacted that a sum not exceeding £5 per cent. should be allowed out of the assets of any deceased person to his executors or administrators on passing his accounts, as commission or percentage for his pains or trouble, as should be just and reasonable.

Glasse, Q.C., J. D. Wood, R. O. Turner, and E. Ward, for the residuary legatees: By the Colonial Act the duty chargeable in Victoria is payable on the net balance of the testator's estate, and is deducted from the payments to the legatees, but as to so much as is payable to the widow the duty is reduced by one-half. This duty appears to be

partly of the nature of English probate duty and partly of the nature of English legacy duty. If it is like probate duty it is confined to property recoverable in the colony, but if it is like legacy duty it is payable only when the testator was domiciled in the colony. Assuming that it is payable wherever the testator was domiciled, then the question arises by whom is it payable in this particular case? We contend that the proper course is to pay all legacies ratably out of the personal estate in Victoria, and the personal estate elsewhere, so that, if the personal estate in Victoria be one-twentieth of the whole, each legatee must allow a deduction from his legacy of £3 per cent. English duty on the whole legacy, and also £6 per cent. Victoria duty on the one-twentieth of the legacy, making together £3 6s. per cent. 282] upon the *whole. Under any circumstances the widow can only be charged with half of the Victoria duty.

[They cited *Wallace v. Attorney-General* ('); *Bell v. Master in Equity of Supreme Court of Victoria* (*).]

J. Pearson, Q.C., and *Wolstenholme*, for the specific legatee: The testator was domiciled in England, the legatees are in England, and can sue for and are entitled to be paid their legacies here according to English law; they have nothing to do with the situation of the testator's assets. By English law his personalty is considered situated where he is domiciled, and it is the business of the executors to realize all property out of England, to have the proceeds remitted to England, and to distribute the whole estate here as one fund. All costs of so doing are expenses of administration which properly fall on the residue. The legatees living here can no more be required to contribute to payment of taxes and costs required to be paid in another country in order to recover and get in the testator's estate there, than they can be required to contribute to the expenses of remitting home the proceeds, or to the payment of auction fees, stamp duty, or commissions, on realizing the testator's property. All the assets should be brought to England for administration here, and when so brought are liable to pay the legacies without any deduction except English duty.

Moreover there are assets elsewhere than in Victoria more than sufficient to pay the legacies, and the residuary legatees have no right to throw any part of the legacies on Victoria assets.

MALINS, V.C.: This appears to me to be a very clear case. The point arises in this way. Mr. John Peter, who died about a year ago, left a fortune of great value—about

(') Law Rep., 1 Ch., 1.

(*) 2 App. Cas., 560.

£700,000—as I understand. He was domiciled in England, and he gave general legacies to the amount of something between £400,000 and £500,000, and then he directed that his residuary estate should be divided, not among all the pecuniary legatees, but among some of them in proportion to the *amount of each legacy, so that a legatee of £20,000 [283 gets double the amount of residue which comes to one who gets £10,000. There are abundant assets to pay every legatee, and to leave a large residue of £200,000 or £300,000. It so happens that the testator made his fortune principally in the colony of Victoria, at Wagga Wagga. Some of his assets, but only a small portion of them, are in that colony. In that colony there is an act making the estate of every deceased person pay certain duties, and those duties are to be deemed a debt of the testator or the intestate as the case may be. Now let me put the case suggested in argument. Suppose the assets in Victoria are £25,000, then that £25,000 must pay the duty which is imposed by the act as a debt due from the testator; and suppose that takes £3,000, or, for illustration, say £5,000, what is the consequence? The consequence is that the general estate of the testator which will be received by the executors here would not be £25,000 but £20,000. Now it is contended, inasmuch as this is an expense incurred in getting the property from Victoria, that the pecuniary legatees who are to be paid partly out of those funds must bear their proportion of the duties imposed in the colony; but it appears to me as plain as that two and two are only four, that the general estate which comes into the hands of the executors here is the amount that remains after paying the expenses in Victoria, and therefore the property must pay its proper proportion under the act in Victoria. If that is £5,000, then the executors get the £20,000, as forming part of the general assets, and out of those general assets all the legacies must be paid free of all deductions except those to which they are liable by the law of England. Then the question is raised whether it is like probate duty or legacy duty. If it is legacy duty, then it is said to be like a debt the testator owed. It might as well have been argued that, if the testator had owed £5,000 in the colony of Victoria, when they got the £25,000 less the £5,000 which he owed to an individual, the legacy must pay part of that debt, whereas the assets are those that remain after paying the debts; and the debt is here a debt of 5 per cent. due to the government, and what you get, after paying the debt or duty imposed, comes here as part of the general estate, and after those deductions there remain in the

284] hands of the executors the assets *to pay debts and general legacies payable out of the general estate. With regard to the question whether it is legacy or probate duty, I think it is immaterial, though I am bound to say if it is like either of them it is much more like probate duty than legacy duty. It is perfectly clear that, whatever are the expenses of getting these assets in Victoria, whether they are the expenses of calling them in, or selling property, or paying duty to the government, they are all deductions to be made as expenses of the estate to be paid out of the estate generally; and that which remains after paying all the debts of the testator, remains as assets of the testator and goes to pay the legacies in full, and there is no obligation on the legatees to pay part of those expenses.

Then as to the commissions that have to be paid, and the expenses of taking out advertisements, and so forth, they all form part of the expense of realization, and will come out of the general estate.

Solicitors: *Domville, Lawrence, Graham & Long; Ward, Mills, Witham & Lambert.*

See 25 Eng. Rep., 799-800 note.

As to when a legacy of an annuity, payable out of the income of an estate, must be paid out of the principal if the income prove insufficient: *Delancy v. Van Aulen*, 21 Hun, 274; *Pierepont v. Edwards*, 25 N. Y., 128.

As to who takes dividends of stock, etc., when it goes to the *corpus* of the

estate and when not, see 18 Alb. L. J., 261, same as a note to Moss's Appeal, 82 Penn. St. R., 264, 18 Am. Rep., 164, 169 note.

See also *Ellingwood v. Beare*, 59 How. Pr., 503; *Van Emburgh v. Ackerman*, 8 Redf. Surr. Rep., 499, 2 N. Y. R. S., 726, § 40, 2 Edin. St., 675.

[10 Chancery Division, 285.]

V.C.B., Jan. 11, 23, 1879.

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*BARRETT V. HAMMOND.

[1878 B. 115.]

Defaulting Trustee—Writ of Attachment—Debtors Act, 1869 (32 & 33 Vict. c. 62), s. 4—Debtors Act, 1878 (41 & 42 Vict. c. 54), s. 1.

The policy of the Debtors Acts, 1869 and 1878, in leaving a defaulting trustee exposed to the penalty of imprisonment is not vindictive; the object of the penalty is simply to produce payment of the money.

Where it is shown that imprisonment of a defaulting trustee will not be productive of payment, the court, in the exercise of the discretion given by the Debtors Act, 1878, will refuse an application for a writ of attachment.

MOTION. By an order in this suit dated the 25th of July, 1878, it was ordered that the defendant Edwin Hammond should, on or before the 6th of August, or subsequently

within fourteen days after service of the order, pay into court to the credit of the action the sum of £204 5s., appearing by his affidavit filed the 19th of July, 1878, and the account exhibited thereto, to be in his hands as trustee and executor of the will of John Leach, deceased, the testator in the action.

The defendant made default, and on the 16th of December notice of motion was served on him that a writ of attachment might be ordered to issue against him for non-compliance with the order.

By an affidavit filed on the 19th of December the defendant deposed, "I have no means at present of paying the sum of £204 5s. referred to in the notice of motion, or any part thereof; nor am I aware when I shall be able to pay such sum or any part thereof."

Pace, for the plaintiff, now moved accordingly.

Charles Browne, for the defendant: Sect. 4 of the Debtors Act, 1869 (32 & 33 Vict. c. 62), excepts out of the operation of the statute a default by a trustee or person acting in a fiduciary capacity, and ordered by a court of equity to *pay any sum in his possession or under his control. [286 But now, by sect. 1 of the Debtors Act, 1878 (41 & 42 Vict. c. 54), a discretion is given to the court to inquire into the case, and the court is empowered to grant or refuse, either absolutely or upon terms, any application for a writ of attachment.

In a case of *Street v. Hope*, before Vice-Chancellor Malins on the 12th of December, 1878, where the defaulting trustee deposed that he could not obey the order of the court because he had no pecuniary means, the Vice-Chancellor refused to make any order on the motion. In this instance the debtor says he has no means.

BACON, V.C., ordered the motion to stand till the 23d of January, in order that the circumstances of *Street v. Hope* might be inquired into.

Jan. 23. *C. Browne* again referred to *Street v. Hope* (''): The *principle of the learned Vice-Chancellor's de- [287

(¹) V.C.M., Dec. 12, 1878.

STREET v. HOPE.
[1876 S. 432.]

THIS was an action commenced by writ on the 18th of November, 1876, on behalf of infants named Street, by their mother and next friend, against John Hope and Charles William Havers, who in June, 1874, were appointed

new trustees of the marriage settlement, dated in August, 1856, of Mrs. Street. The statement of claim was to the effect that the defendants had sold out the whole or a large portion of a sum of £1,000 New £3 per Cent. Annuities, part of the trust funds, and had reinvested the same upon insufficient and unauthorized security, and prayed that the defendants might be decreed

cision was that the policy of the statute is not vindictive, and that imprisonment *is to be inflicted only where there is a probability of its being productive of the money.

Pace, in reply: The matter is one of discretion; and the discretion of the court will be exercised only on consideration of the merits of the case.

Street v. Hope was not analogous to this. There it was shown that the money was advanced at the request of the *cestui que trust*. There is no such case here; the inference is that this trustee got the money in, and spent it. The plaintiffs are entitled to the writ.

BACON, V.C.: It is quite true that the case before the Vice-Chancellor Malins differed as to the facts from the

to replace and transfer the said sum into court, subject to the trusts of the settlement.

The defendant Hope's defence was immaterial for the purposes of this report.

The defendant Havers, by his statement of defence, admitted that he and the defendant Hope, at the request of Mrs. Street and her husband, sold out the whole of the £1,000 stock on the 12th of July, 1874, and proceeded to narrate circumstances, which came to this, that the sale took place in order that the proceeds might be advanced, and that the same were advanced, for the purpose of satisfying creditors, with whom Street, who was in business as a shoemaker at Tunbridge Wells, had agreed to settle by instalments.

The defendant Hope, by his statement of defence, said that during the whole of the last mentioned proceedings Street was dealing with Havers for goods in his trade, and that Street complained to defendant that he had been compelled by Havers' firm to take and pay for goods amounting to nearly £800 in a little more than twelve months. He further alleged that the defendant Havers had retained a large portion of the trust money for his own use.

Havers, in rejoinder, admitted the last mentioned business transactions, and that Street was indebted to Havers' firm in a sum of £35; but absolutely denied that he had applied any of the trust moneys to his own use.

On the 6th of November, 1877, the

court made an order directing the defendants Hope and Havers to transfer into court to the credit of the action the sum of £442 11s. 6d. stock within one month from service of the order.

Notice of motion on behalf of the plaintiffs that they might be at liberty to issue a writ of attachment against Hope and Havers for not having made the transfer into court ordered on the 7th of November, 1877, was dated the 11th of November, 1878.

The defendant Havers filed an affidavit, in which he said:

"I am unable to transfer £442 11s. 6d. New £3 per Cent. Annuities into court in compliance with the order of the 6th of November, 1877; I have not the pecuniary means.

"I have no income from any source except what I derive from the business of Jones & Havers, of 3 Charles Street aforesaid, in which business I am a working partner only, and since I have been unable to work in the business I have not had any income except that which my wife has earned from working in the said business of Jones & Havers; and if from any cause my wife should be unable to continue to work in the said business I should be without any income whatever, and totally destitute. I have no capital in the business, and I never was other than a working partner, and it has not at any time produced me more than £3 10s. a week for my share.

"The plaintiffs have sold my household furniture under a writ of sequestration for £23 0s. 6d. being, as I am in-

case now before me. But the judgment of the Vice-Chancellor did not proceed upon those facts—it went upon the general policy of the law.

Now the policy of the law is plain enough. It appears from the language of the statute. The general policy of the Debtors Act, 1869, gave the judge no power to inquire, before allowing the writ to issue, whether the debtor [289 had the means of satisfying the order or not. But the Amendment Act of 1878 gives to the court a jurisdiction, which it did not possess before, of inquiring into the case, and of either granting or refusing the application for the writ of attachment.

The question then comes to this, whether it will serve any good purpose to send this man to gaol. The law does not act vindictively; the court has no power to inflict any pun-

formed, a less sum than the costs they have incurred in relation to such writ.

"I have been unable to work for the last three and a half years and upwards, and am now unable to do anything or help myself. I am impoverished by the proceedings in this action, and in consequence of my inability to work I have been obliged to avail myself of the sick allowance from the society of Foresters, of which I am a member."

The defendant Havers' partner in business, Joseph Jones, confirmed the above statements, and further deposed as follows:

"The said defendant has not been able to take any active part in the business for the last three and a half years, and all the work that has been done on his behalf has been done and performed by the said defendant's wife."

Charles Browne, for the plaintiffs, moved for the writ: The Legislature, in passing the act of 1878, could not have intended to abolish the penalty of imprisonment merely because the defaulter cannot pay the debt. The object of the plaintiffs is to use the threat of imprisonment in order to induce the defendant to pay. The money was lent to the *cestui que trust*, in order that he might pay back a debt due to the firm of Jones & Havers.

The defendant Hope did not appear.

Whitehorne, for the defendant Havers: This is eminently a case for the exercise of the discretion reposed in

the court by the act of 1878. No good purpose will be served by sending this man to prison.

Browne, in reply.

MALINS, V.C.: Before the act of 1878 there were many cases of great hardship in which trustees were sent to gaol for having committed breaches of trust when no moral blame attached to their conduct. Consequently the Legislature has in the last session passed an act giving the judge power to inquire into the case, and to grant or refuse the application for a writ of attachment either absolutely or on terms.

In this case the circumstances have been inquired into. It is found that this man has got into difficulties through lending a portion of the trust moneys to the *cestui que trust*, a thing he was not justified in doing. But to send him to prison would not enable him to pay the money—it would not be productive of payment of the debt. Mr. Browne says that the threat of imprisonment will induce him to pay the money. I am not sure of that; there is evidence that the man is in a bad state of health.

The court has power to grant or to refuse an application of this kind, and in the exercise of my discretion I refuse the present application. There will be no order on the motion as to costs or otherwise.

Solicitors: Minet, Smith, Son & Harvie; C. E. Goldring; Pearce & Son.

ishment upon the man; and sending him to prison will not enable him to pay this money.

I can make no order in this case, as to costs or otherwise.

Solicitors: *R. B. T. Barrett; Denton, Hall & Barker.*

[10 Chancery Division, 289.]

V.C.B., Nov. 30, 1878.

CROOKES V. WHITWORTH.

[1878 C. 291.]

Practice—Partition Act, 1876 (39 & 40 Vict. c. 17), s. 6—Request by Persons under Disability—Form of Judgment.

In a partition action by a married woman and her husband her request for sale may be made by her counsel authorized to act on her behalf.

THIS was a partition action between co-heiresses, of whom one was joined with her husband as plaintiff without a next friend, and the others were made defendants.

The plaintiffs and defendants concurred in requesting a sale, and the only question was as to the mode in which the request on the part of the married woman should be expressed.

Solomon, for the plaintiffs: By the Partition Act, 1876, s. 6, a request for sale may be made on the part of a married woman, &c., or person under disability, by the next friend, &c., "or other person authorized to act on behalf of the person under such disability." There is no next friend in this case, as the married woman plaintiff sues with her husband. It is submitted that the request may be made by 290] *plaintiff's counsel, who is authorized to act on her behalf for this purpose. He referred to *Higgs v. Dorkis* (').

G. Williamson, for the defendants.

BACON, V.C.: As you tell me you are duly authorized, I think that will do. The order may be prefaced by a statement that "the plaintiffs and defendants by their counsel duly authorized, requesting a sale, &c.," which will show that the terms of sect. 6 have been complied with.

The order as drawn up was thus prefaced: "The plaintiffs and the defendants, who claim to be the sole parties interested in the hereditaments in the statement of claim mentioned, by their counsel, who are authorized to act on behalf of such of the plaintiffs and defendants as are

(') Law Rep., 13 Eq., 280.

married women, requesting a sale, &c." Reg. Lib. 1878, A. 2167.

Solicitors : *H. J. V. Philpott*, agent for S. Redfern, Chesterfield ; *Williamson, Hill & Co.*, agents for Bagshawe, Sheffield.

[10 Chancery Division, 291.]

C.A., Nov. 27, 1878.

*SHEFFIELD V. EDEN.

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[1876 S. 132.]

Solicitor—Lien—Mortgage by Client to his Solicitor.

A client mortgaged property, which was at the time subject to a first mortgage, to his solicitors, who prepared the mortgage deed to themselves. Afterwards the mortgagor made a third mortgage to another person :

Held, in an action by the solicitors against the first and third mortgagees and the mortgagor, that they were entitled only to their ordinary costs as mortgagees, and that they had no lien on the mortgage deed for the costs of its preparation or other costs due to them from the mortgagor.

By two indentures dated the 13th of January and the 30th of March, 1868, Thomas Edward Eden (since deceased) conveyed certain freehold pieces of building land to the plaintiffs, Isaac Sheffield and Thomas Needham Sheffield, and their heirs, by way of mortgage for securing the repayment of sums of money which they had agreed to advance on his account to a builder.

The property was at that time subject to a first mortgage for £12,000 to another person, and the title-deeds were in his possession. The property was afterwards mortgaged a third and a fourth time.

The plaintiffs acted as the solicitors of T. E. Eden, and prepared the two mortgage deeds of the 13th of January and the 30th of March, 1868, to themselves.

The present action was brought by the plaintiffs against T. E. Eden, who died during the progress of the suit, and against the first, third, and fourth mortgagees, asking to redeem the first mortgagee, and to foreclose the third and fourth mortgagees and the mortgagor. The plaintiffs alleged that they were entitled to costs, charges, and expenses incurred as the solicitors of T. E. Eden, and claimed a lien on all deeds and documents in their possession in respect thereof.

At the hearing before Mr. Justice Fry, the usual decree for redemption and foreclosure was made. When the minutes were being drawn up the plaintiffs applied to the

Registrar to insert in the decree a direction that an account 292] should be taken of *what was due to them for costs in respect of which they had a lien on the deeds and papers in their possession, and that if the third and fourth mortgagees and the representatives of the mortgagor should redeem the plaintiffs under the decree without paying the amount certified to be due on taking such account, the said lien might not be prejudiced, nor the plaintiffs ordered to deliver up the deeds and papers in their possession. The Registrar having refused to insert this direction, the plaintiffs made an application to Mr. Justice Fry in court to vary the minutes in the way proposed, but his Lordship declined to entertain the application, the question not having been considered at the hearing of the action. The plaintiffs appealed from this decision.

Fischer, Q.C., and Whitehorne, for the appellants: We claim a lien on the mortgage deeds and all the documents connected with the mortgage security, such as abstracts, draughts, &c., not only for the costs of preparing the mortgage deeds, but generally for costs due to the appellants from Eden: *Colmer v. Ede* ('). The mortgage deeds were drawn under Eden's instructions, and the appellants are entitled to hold them against all the world till their costs are paid. It is contended by the respondents that no lien could arise because the mortgage deeds were drawn by the appellants for themselves, and were exclusively their property. But that is not the case. The appellants had only a qualified property in the deeds as mortgagees; the mortgagor always had a contingent property in them, and if the loan had gone off, or if he had redeemed, they would have become his property altogether. He had therefore always such an interest in them as would support a lien in the solicitors.

North, Q.C., Alexander, and Sangster Green, for the defendants, were not called on.

JAMES, L.J.: I am of opinion that this appeal must be dismissed. The deeds in question being mortgage deeds by which the client gave a charge on his property to his solicitors, never were the deeds of *the client; they were the solicitors' own deeds. They might have had a claim against their client as mortgagor for their preparation, but when the deeds were executed they became the deeds of the solicitors. A lien only attaches to documents which are the clients' property; it cannot extend to what is the solicitors' own property.

(') 40 L. J. (Ch.), 185.

BAGGALLAY, L.J.: I am of the same opinion. We have not seen the deeds; the case has been argued on the assumption that they are the mortgage deeds alone. Directly these deeds were executed they remained in the possession of the solicitors, not in their capacity of solicitors to the mortgagor, but as their own property as mortgagees. The property was in them, not in their client. They might have handed them over without his consent to another person as transferee of the mortgage, or as purchaser under their power of sale.

THESIGER, L.J.: I am entirely of the same opinion. These deeds were in no sense the deeds of the mortgagor, but were the deeds of the mortgagees as such, and not in their possession as solicitors for the mortgagor. I may add that although there may be a contingent right of redemption in the mortgagor, it would be unreasonable to imply a lien from such a right, and reasonableness is the foundation of all the legal doctrine of lien.

Solicitor for the plaintiffs: *F. Sheffield.*

Solicitors for the defendants: *C. Blake; Benham & Tindell.*

[10 Chancery Division, 294.]

V.C.M., Nov. 5, 6: C.A., Dec. 4, 1878.

*DAY V. BROWNRIGG.

[294

[1878 D. 11.]

Injunction—Assuming Name of House—Damage to Property—Demurrer—Damnum absque injuria.

The plaintiffs alleged in their statement of claim that their house had been called "Ashford Lodge" for sixty years, and the adjoining house belonging to the defendant had been called "Ashford Villa" for forty years, and that the defendant had recently altered the name of his house to that of the plaintiffs' house. The plaintiffs alleged that this act of the defendant had caused them great inconvenience and annoyance, and had materially diminished the value of their property, and they claimed an injunction to restrain the defendant from continuing to use the name of their house:

Held (overruling the decision of Malins, V.C.), that the alleged act of the defendant in calling his house by the name of the plaintiffs' house was not a violation of any legal right of the plaintiffs: and there being no allegation of malicious intention, a demurrer to the statement of claim was allowed.

Semble, no change has been made by the Judicature Act, 1873, s. 25, subs. 8, in the principle on which the court grants injunctions.

DEMURRER. The plaintiffs in this action were Thomas Day and Jane his wife, and the defendant was General Brownrigg. According to the allegations in the statement of claim, the trustees of the plaintiffs' marriage settlement,

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Day v. Brownrigg.

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in August, 1864, purchased as such trustees certain hereditaments and premises at Ashford, in Middlesex, called the Ashford Lodge estate, which were conveyed to the trustees upon the trusts of the settlement. The Ashford Lodge estate consisted of a large detached house with outbuildings and appurtenances, and sixteen acres of land. The plaintiffs had ever since the purchase resided at the house. The house had, for sixty years previously, been called, by the successive owners thereof, and had been commonly known as, "Ashford Lodge," and by that name it had always been designated and described in all legal documents relating thereto. Shortly after the purchase of this estate the defendant acquired from his father, and came into possession of, a small estate adjoining and in part bordering on the said Ashford Lodge estate, and the defendant's estate consisted of *a villa and its appurtenances, and about nine acres of land. The said villa had always been called and known as "The Villa, Ashford," or "Ashford Villa," for the last forty years, and it had always been so described in instruments of title relating thereto. In the course of the year 1876 the defendant, for the first time, and without any justification therefor or right so to do, wrongfully, unlawfully, and improperly changed the name and designation of his villa and estate from that by which it had been called and known, and proceeded to call it "Ashford Lodge," and the defendant persisted in using such name, notwithstanding remonstrances by the plaintiffs.

The statement then alleged that, by reason of such change of name, the defendant had caused, and was constantly causing, considerable expense and damage, and extreme personal inconvenience and annoyance to the plaintiffs, and such inconvenience and annoyance had greatly increased during the last year. The defendant had thereby, as he well knew, damaged the means of identifying the house and estate of the plaintiffs, and their title thereto; and the value of the plaintiffs' estate had thereby been greatly decreased, and if the defendant were allowed to continue to so call and style his house and estate, one of the means of identifying the plaintiffs' house and estate would be totally destroyed, and their title would be rendered doubtful, and would be greatly injured, and the value of the same would be materially diminished. By reason of such acts and proceedings of the defendant, the defendant had slandered the title of the plaintiffs to their house and estate, and had caused persons who had known by the plaintiffs' house by the name of

Ashford Lodge, and now for the first time heard the name applied to the defendant's house, to believe that the defendant was the owner or occupier of the plaintiffs' house, whereby great damage had accrued, and would accrue, to the plaintiffs.

The plaintiffs claimed that the defendant might be restrained from styling or describing the villa and estate occupied by him as "Ashford Lodge," and from advertising or publishing, or in any way holding out or representing, that "Ashford Lodge" was the name or designation of the said house occupied by the defendant, or that he, the defendant, was the owner of the house *and estate belonging to [296 and occupied by the plaintiffs, and hitherto known as "Ashford Lodge."

The defendant demurred to this statement of claim. The demurrer came on to be heard on the 5th of November, 1878.

Glasse, Q.C., and *Cozens-Hardy*, for the demurrer: First, we say that this case is too frivolous for the interference of the court. There is no damage alleged on the claim for which the plaintiffs could recover in an action at law. The only charge upon which any case can be founded is slander of title. If it is not that, it is nothing. But to substantiate a charge of slander of title it is essential that falsehood and malice should be charged and proved. There is no such charge here. In *Pater v. Baker* (*) Justice Maule said: "In slander of title it is essential, to give a cause of action, that the statement should be false. It is essential also that it should be malicious: not malicious in the worst sense, but with intent to injure the plaintiff. . . . Unless he shows falsehood and malice and an injury to himself, the plaintiff shows no case to go to the jury." In *Stewart v. Young* (") Justice Byles observed: "In slander of title two things must concur—the statement must be false and it must be malicious;" and the same view was expressed in *Brook v. Rawl* (").

The only allegation is that the defendant had changed the name of his house to that of the plaintiffs, after it had been known by another name for forty years. That is no cause of action. A man is at perfect liberty to change the name of his house or his own name, and to adopt the name of his neighbor's house, or to take his neighbor's name. It is not a cause of action, and the utmost that can be said is that some inconvenience may possibly be caused to the plaintiffs by the defendant's conduct. The court cannot

(*) 3 C. B., 831, 868, 869.

(") Law Rep., 5 C. P., 122.

(*) 4 Ex., 521.

restrain the publication of a libel, even if it is injurious to property. That was decided in *Prudential Assurance Company v. Knott* (¹), notwithstanding it had been held otherwise in *Dixon v. Holden* (²), *Springhead Spinning Company v. Riley* (³), and *Saxby v. Easterbrook* (⁴).

297] **Higgins*, Q.C., and *Seward Brice*, in support of the plaintiffs' claim: It is not necessary in a charge of slander of title to prove falsehood and malice. It is sufficient to state facts from which the court may infer malice. We state facts sufficient to prove that the defendant must be actuated by malice to act as he is doing. The course of practice now under Order XIX, rule 4, is merely to state the facts on which you rely, and then say you rely on slander of title, and if our facts are admitted the court must imply malice.

It is not necessary in cases of slander of title to allege malice in the ordinary definition of the word. The meaning of malice, as laid down in *Ferguson v. Earl of Kinnoull* (⁵), is not confined to personal spite, but consists in a conscious violation of the law to the prejudice of another; and in *Bromage v. Prosser* (⁶) it is defined thus, "a wrongful act done intentionally without just cause or excuse." We say the defendant had no excuse for doing this act. It is not necessary to put it higher than that. But we do not go solely upon slander of title, because we allege damage and injury to our property. We say that our house has been known as Ashford Lodge for sixty years, and the defendant's house has been known for forty years up to 1876 as "Ashford Villa," and we say that in consequence of the defendant having adopted the name of our house we have been caused considerable expense and trouble, and we have been materially injured and our property seriously damaged. There is quite sufficient stated upon this claim to show injury and damage to property.

In such a case as this we have good ground of action. In *Western Counties Manure Company v. Lawes Chemical Manure Company* (⁷), it was held to be actionable to make a false statement disparaging the quality of the plaintiff's goods, from which special damage had resulted.

In numerous other cases the court has restrained acts by which injury to property might arise: *Byron v. John-*

(¹) Law Rep., 10 Ch., 142.

(²) Law Rep., 7 Eq., 488.

(³) Law Rep., 6 Eq., 551.

(⁴) Law Rep., 7 Ex., 207.

(⁵) 9 Cl. & F., 251.

(⁶) 4 B. & C., 247.

(⁷) Law Rep., 9 Ex., 218; 10 Eng. R., 391.

ston⁽¹⁾, *Routh v. Webster* ⁽²⁾, *Maxwell v. Hogg* ⁽³⁾, *Braham v. Beachin* ⁽⁴⁾, and Kerr on Injunctions ⁽⁵⁾.

*Even if the court could not before the Judicature [298] Act restrain the publication of a libel injurious to property, it can do so now, *Thorley's Food for Cattle Company v. Massam* ⁽⁶⁾; and in *Beddow v. Beddow* ⁽⁷⁾ the Master of the Rolls was of opinion that the jurisdiction of granting injunctions was now practically unlimited, and could be exercised in any case in which it was right or just to do so. An opinion to the same effect on the subject of libel was expressed by his Lordship in *Hinrichs v. Berndes*, before the Master of the Rolls on the 18th of January, 1878.

MALINS, V.C.: In deciding the question raised upon this demurrer, I express no opinion as to what may be the ultimate result of the case if the parties have not the good sense to forbear carrying such a cause to a hearing. All I am now called upon to decide is whether, upon the allegations of this statement, the demurrer must be overruled or can be sustained.

By those allegations it appears that the plaintiff, Mr. Day, acquired this property, called Ashford Lodge, at Ashford, in Middlesex, in the year 1864. It was conveyed to his trustee, and he, as *cestui que trust*, has been in possession of Ashford Lodge from 1864 downwards; but it has been known for a period of no less than sixty years by that name, "Ashford Lodge." It also appears that the defendant acquired from his father an adjoining residence, which for forty years had been known as "Ashford Villa:" therefore the defendant, in 1864, becoming the owner, and I suppose the occupier, of "Ashford Villa." There is Mr. Day occupying Ashford Lodge, and immediately adjoining and in part bordering on Ashford Lodge there is General Brownrigg occupying Ashford Villa; and why General Brownrigg, occupying a well-known residence, which had been the property of his father, and had been occupied and for many years known by the name of Ashford Villa, could not be as happy in that residence by the title of "Ashford Villa" as by the title of "Ashford Lodge," it is difficult to see. I suppose the word "villa" implies to the general public a rather small residence, and if this is a residence of considerable importance, I can well understand he would desire to change it from "villa" to something else. But when he found his *neighbor already had possession for sixty [299

⁽¹⁾ 2 Mer., 29.

⁽²⁾ 10 Beav., 561.

⁽³⁾ Law Rep., 2 Ch., 307.

⁽⁴⁾ 7 Ch. D., 848; 25 Eng. R., 55.

⁽⁵⁾ Page 357.

⁽⁶⁾ 6 Ch. D., 582; 23 Eng. R., 182.

⁽⁷⁾ 9 Ch. D., 89; 25 Eng. R., 786.

years of Ashford Lodge, he must have known that by adopting the same title it must be inconvenient to himself and inconvenient to his neighbor, Mr. Day, because when two houses immediately contiguous to each other are called by the same name it must lead to inconvenience and to confusion, and inconvenience is damage. Therefore, if he wished to adopt a name which would imply a larger residence than "villa," why could not he call it "Ashford House," which may imply a residence of any size? However, he thought fit in 1876, for the first time, to call his house by the same name as his neighbor Mr. Day called his, and those who had been in possession before him had called it, for not less than sixty years. Now, that this was an inconvenience and an annoyance, and to a certain extent I am bound to say a damage, there can be no doubt whatever.

Under these circumstances I suggested originally that something should be done by which this unseemly dispute might be brought to an end, and I suggested yesterday that now even they had much better refer it to some common friend to say what ought to be done between them. That, I understand, the plaintiffs are perfectly willing to accede to, but it is absolutely refused on the part of the defendant. Therefore I have nothing to do but to decide the question between them as raised by this demurrer. Mr. Glasse, in his opening, submitted that the case was too frivolous for the interference of the court. That I have not to decide now; what I have to decide is whether I am to allow or overrule this demurrer.

Now, has the plaintiff or not sustained damage? The damage may be trifling, but I am very clear of opinion that in the nature of things the very circumstances must lead to damage to some extent and annoyance to the last degree. You cannot come here to prevent an annoyance unless it amounts to something in the nature of destruction or interference with property. If a man makes an unseemly noise near his neighbor he can be restrained by the injunction of this court. If he emits offensive smells by any process, the court may stop that. Annoyance amounting to injury can be interfered with, but mere annoyance to taste cannot. This, however, is a thing which I am bound to say is wholly unjustifiable. I cannot imagine a more unneighborly *act than that of General Brownrigg, in persisting to assume the name of his neighbor's house.

I have heard long arguments, and cases very interesting and very important, when necessary, have been appealed to. Although the doctrine of this court as to the issuing of in-

junctions to stop libels was questioned at one time, I am bound to say that I consider there is no doubt about it now, after the decision in the case of *Byron v. Johnston* (¹), which was cited; and even before the decision in that case, there can be no doubt that the jurisdiction which I exercised in *Dixon v. Holden* (²) was in strict accordance with the well-established rules of this court. It was my conviction, is my conviction, and I believe will ever be so. However, it is not necessary to go into that question, for this is not a case of libel. It is said to be not wholly but partly a case of slander of title; but it is not necessary for me to decide the question of slander of title, because upon the demurrer it is sufficient if there is one good ground of relief.

Then, is there in this statement of claim anything which entitles the plaintiff to relief? The plaintiff says he has sustained damage. I have already expressed my opinion that there must be damage. It may be small, but he must, from the very nature of things, sustain some damage. At all events, the demurrer admits the fact that the course adopted by the defendant has diminished and will diminish the value of the plaintiff's property. Whether it be by means of slander of title or otherwise is perfectly immaterial. There is an admission by demurrer of the fact stated in the statement of claim, that the course adopted by the defendant will greatly diminish the value of the plaintiff's property. That is, therefore, a distinct allegation of injury and damage, and it being highly probable—almost certain, to my mind—that there must be damage to a certain extent, the consequence is that the demurrer must be overruled. I will not go into the numerous cases which have been cited on the subject of slander of title. I think they are beyond the point involved in this case. The course adopted by the defendant is, in my opinion, most improper.

I express no opinion what may be the result when the facts are *fully gone into, or whether Mr. Glasse may [301 or may not be right in stating that the case is too frivolous for the interference of the court. That will have to be decided hereafter if the parties will persist in going on with such a dispute. My duty is simply to overrule the demurrer.

From this judgment the defendant appealed. The appeal was heard on the 4th of December, 1878.

Glasse, Q.C., and Cozens-Hardy, for the appellant: The Vice-Chancellor has rested his decision on the ground that actual damage is alleged in the statement of claim. But

(¹) 2 Mer., 29.

(²) Law Rep., 7 Eq., 488.

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that is not enough without showing that some legal right has been infringed. There must be *injuria* as well as *damnum*: *Prudential Assurance Company v. Knott* ⁽¹⁾; *Fisher v. Appollinaris Company* ⁽²⁾. *Dixon v. Holden* ⁽³⁾, on which the Vice-Chancellor relied in his judgment, has been overruled. The case might have been different if fraud or a malicious intention had been alleged; but there is no element of that kind in the present case. There is no authority for the proposition that any man has an exclusive right to the name of his house. With respect to the charge of slander of title, there can be no slander of title without malice, which is not alleged.

Seward Brice (*Higgins*, Q.C., with him), for the plaintiffs: It is not necessary to allege malice in such a case as this. If the plaintiff can show wilful injury to his property, the court will imply malice: *Western Counties Manure Company v. Lawes Chemical Manure Company* ⁽⁴⁾. The right of a man to the exclusive use of the name of his house is analogous to the right to a trade-mark or trade-name. It is no objection to the present claim that it is now made for the first time. New cases must constantly occur calling for the interference of the court, and the court has a *quasi* legislative power to restrain new kinds of injury. The relief given in the case of trade-marks was once a new question, but it is now well established. If we show actual injury to 302] the *plaintiff's property it is sufficient to give us a claim to relief. The jurisdiction of the court has been extended by the Judicature Act, 1873, s. 25, subs. 8, which enables the court to grant an injunction whenever it is "just or convenient." It is not necessary to allege malice to sustain a charge of slander of title: *Bromage v. Prosser* ⁽⁵⁾; *Wren v. Weild* ⁽⁶⁾; *Steward v. Young* ⁽⁷⁾.

JESSEL, M.R.: This is an appeal from the Vice-Chancellor Malins, who has held for the first time, as far as I am aware, and as far as the learned counsel in the case on both sides are aware, that a man has a legal right to the exclusive use of any name he chooses to affix to any part of his landed property, whether consisting of a house or land; for there is no distinction, as far as I can find. Such a right is not known to the law, and it has never been decided that there is such a right of property.

But it has been suggested to us by the learned counsel for

⁽¹⁾ Law Rep., 10 Ch., 142; 11 Eng. R., 498.

⁽⁵⁾ 4 B. & C., 247.

⁽²⁾ Law Rep., 10 Ch., 297.

⁽⁶⁾ Law Rep., 4 Q. B., 218.

⁽³⁾ Law Rep., 7 Eq., 488.

⁽⁷⁾ Law Rep., 5 C. P., 122.

⁽⁴⁾ Law Rep., 9 Ex., 218; 10 Eng. R., 391.

the respondent that this court has a power of legislation, and that it would be a beneficial exercise of that supposed power of legislation to invent such a right. I disclaim the power of legislation which is asserted to exist in this court, and I say that if such a right is to be created it must be created by the Legislature properly so called.

Independently of the right so alleged, I can find nothing in this statement of claim to give the right. It is not alleged in the statement of claim that the defendant did this either maliciously or with intent to injure the plaintiffs, or for any improper motive whatever. It only states the fact that he did it "without any justification therefor or right to do so," and that "he wrongfully, unlawfully, and improperly changed or caused to be changed the name." Of course those epithets, under the present system of pleading, are useless and redundant. They add nothing whatever to the plaintiffs' case. They are merely now epithets of abuse. They were formerly in declarations essential, because under that form of pleading legal rights were stated for facts; but facts alone are stated now. The facts alleged in the present *case come to this, that in the year 1876 the defend- [303 ant, "for the first time, without the assent of the plaintiffs and without any justification therefor or right so to do, wrongfully, unlawfully, and improperly changed or caused to be changed the name and designation of his villa," which, as asserted in the claim, had theretofore been called "Ashford Villa," to "Ashford Lodge," the plaintiffs having a house which had been for many years past called "Ashford Lodge." Then they go on to say that, "By reason of the change of name by the defendant and his adoption of the name of the plaintiffs' house and estate as the name and designation of his villa and estate, the defendant has caused and is constantly causing, as he has well known, considerable expense and damage, and extreme personal inconvenience and annoyance to the plaintiffs and to the visitors and other friends of the plaintiffs." But it does not say any more than this, that it will be a consequence of the change. The claim does not even allege he intended to cause it, or, in fact, that there was any notion on his part that the change would cause it. Then the plaintiffs go on to say that in addition to that, "the defendant has thereby, as he well knows, damaged the means of identifying the house and estate of the plaintiffs." That, again, is said to be a consequence of the change, but not a consequence anticipated by the defendant; "and their title thereto and the value of the plaintiffs' estate has thereby been greatly decreased; and if the defendant shall be al-

lowed to continue to so call and style his house and estate, one of the means of identifying the house and estate of the plaintiffs will be totally destroyed, and their title thereto will be rendered doubtful and will be greatly injured, and the value of the same will be greatly diminished." That, no doubt, is rhetorical. It cannot be stated with any real intent that it should be taken as true. But, taking it as a fact, it is again a mere consequence, and certainly is not alleged to have been anticipated by the defendant. Then the plaintiffs say: "By reason of the acts and proceedings of the defendant, the defendant has slandered the title of the plaintiffs,"—he has not technically slandered the title, that is admitted—"and he has represented to all persons who have known the plaintiffs' house and estate by the name or style of "Ashford Lodge," and who now hear the 304] name or style applied to the *defendant's villa and estate, and he has caused such persons to believe that the defendant is the owner or occupier of the plaintiffs' house and estate." That is all governed by this, "by reason of the said acts and proceedings." He does not allege independent proceedings and representations by him, except that he has changed the name, and there the matter ends.

The Vice-Chancellor came to the conclusion at which he has arrived, not upon the ground of slander of title, because that is not alleged, but upon the ground that the demurrer admits the fact that the course adopted by the defendant has diminished and will diminish the value of the plaintiffs' property. He said: "Whether it be by means of slander of title or otherwise is perfectly immaterial. There is an admission by demurrer of the fact stated in the statement of claim, that the course adopted by the defendant will greatly diminish the value of the plaintiffs' property. There is, therefore, a distinct allegation of injury and damage; and it being highly probable, almost certain, to my mind, that there must be damage to a certain extent, the consequence is that the demurrer must be overruled." With great deference to the learned judge of the court below, it appears to me that an allegation of damage alone will not do. You must have in our law injury as well as damage. The act of the defendant, if lawful, may still cause a great deal of damage to the plaintiff. If a man erects a wall on his own property and thereby destroys the view from the house of the plaintiff, he may damage him to an enormous extent. He may destroy three-fourths of the value of the house, but still, if he has the right to erect the wall, the mere fact of thereby causing damage to the plaintiff does not give the

plaintiff a right of action. You must have the two things, and I fail to find the first thing ascertained to exist even by the Vice-Chancellor. Slander of title is not made out. The right to appropriate a name by the plaintiffs is not asserted in the judgment, nor is the right of the defendant to appropriate the same name to his property denied. The plaintiffs are quite at liberty to change the name of their estate if they think proper. They may call their house "Ashford House," or "Ashford Hall," or "Ashford Castle," if they please, or they may call it "Old Ashford Lodge," or "The Original Ashford Lodge," or anything else they like, but to say that *they have a right to use that name to the exclu- [305 sion of all other of Her Majesty's subjects is, as I said before, admitted to be quite novel. No authority has been produced for it, and I can see no good reason for the allegation that such a right has so existed from time immemorial and is part of the customary or common law of the land. That being so, it seems to me the demurrer is well founded and that it ought to have been allowed.

JAMES, L.J.: I am entirely of the same opinion. It appears to me there is no damage alleged, there is no legal right alleged, the violation of which was the cause of damage. That being so, it is not for this court to say that because somebody is doing something which it thinks not quite right, a thing which ought not to be done by one person to another, it should interfere. This court can only interfere where there is an invasion of a legal or equitable right. No such legal or equitable right exists, in my view of this case, and therefore the demurrer ought to have been allowed. I think it right to add this, that it is not, in my opinion, proper, where, for the purpose of meeting a litigation, the defendant is advised to stop the action *in limine* by demurrer—which he has not only a right to do, but which he ought to do, to diminish the costs of the litigation as much as possible—he should be exposed to reprehension, as if the allegations which are admitted to be true, for the purpose of decision upon demurrer, were true *de facto*. It is quite possible that they may be wholly or substantially fictitious.

THESIGER, L.J.: I am entirely of the same opinion. It appears to me that the judgment appealed from is founded upon a misconception of the legal maxim that where there is a wrong there is a remedy. On the one hand it appears to me that there is no legal right which has been invaded in this case. It is not contended now that the right which has been invaded is the title. In other words, it is not contended

that the injury is one which comes within the definition of slander of title. On the other hand, it cannot reasonably be contended that this case stands upon the same footing as the 306] cases *of trade-marks, which undoubtedly stand upon a very peculiar footing. Therefore the only right which can be alleged is this, namely, that there is a right to the exclusive appropriation of the name here adopted in respect of any particular property. It seems to me there is neither principle nor authority in support of that contention. But, assuming for a moment that there is a legal right alleged, and one which might be invaded under such circumstances as would constitute a cause of action, still in this case there is no sufficient cause of action alleged. It is not alleged that the act done by the defendant was done with the intention to injure the plaintiff; it is not alleged that the act was done either fraudulently or maliciously. Assuming for the moment that the case could be put as high as a case of slander of title, then it is clear that in order to support an action for slander of title you would have to prove malice; it is true, as has been suggested on behalf of the plaintiffs, that malice is implied by law where a wrongful act is done intentionally without lawful excuse. But in one way or another, either by the use of the term "maliciously" or by the use of some equivalent expression, the statement of claim or declaration, or whatever it may be, should show that a well-founded cause of action is alleged. Here there is no such allegation. It has been said that the case of the *Western Counties Manure Company v. Lawes Chemical Manure Company* ('), which was decided in the Exchequer, is some authority in support of the present action. I cannot see that that affords the smallest foundation for this action. That was a case in which there had been a statement made in writing disparaging a particular manufacture of the plaintiffs, and in addition to that it was stated in distinct terms in the declaration which was demurred to, that the statement was made falsely and maliciously contriving to injure the plaintiff. Mr. Baron Bramwell, in his judgment, commenting upon that, says, "So that it appears there was a statement published by the defendants of the plaintiffs' manufacture, which is comparatively disparaging of that manufacture, which is untrue so far as it disparages it, and which has been productive of special damage to the plaintiffs; and it is stated that that publication was made falsely and maliciously, which possibly may mean nothing more 307] than that it was made *falsely and without reasonable

(') Law Rep., 9 Ex., 218, 221; 10 Eng. Rep., 391.

cause, calling for a statement by the defendants on the subject. But if actual malice is necessary—which I do not think is the case—the allegation is sufficient.” The present case, as has been stated, is really one of first impression, and I cannot see any principle or foundation upon which the judgment of the court below can properly be supported.

JAMES, L.J.: I think it right to add that the power given to the court by sect. 25, sub-sect. 8, of the Judicature Act, 1873, to grant an injunction in all cases in which it shall appear to the court to be “just or convenient” to do so, does not in the least alter the principles on which the court should act.

JESSEL, M.R.: It must be “just” as well as “convenient.”

Leave to amend the statement of claim was refused.

Solicitors for plaintiffs: *Boxall & Boxall*.

Solicitors for defendant: *Wilson, Bristow & Carpmael*.

See *ante*, 346 note.

[10 Chancery Division, 307.]

C.A., Dec. 14, 16, 1878.

In re DUCHESS OF WESTMINSTER SILVER LEAD
ORE COMPANY.

Appeal—Rules of Court, 1875, Order LVIII, rr. 2, 3—Costs—Shorthand Notes of Evidence.

A., B., and C. agreed with a company to take 1,400 £1 shares, to be equally divided among them, in respect of which shares £310 had been paid generally. The company having been afterwards ordered to be wound up, an order was made putting A. on the list of contributories for 157 shares, B. for 466, and C. for 467. A. was put on the list for 157 shares only, because the judge considered that under an arrangement between the parties the £310 was to be attributed to A.'s shares, so that 310 of them were fully paid up. B. appealed generally from this order, serving only the official liquidator. The Court of Appeal was of opinion that B. was properly put on the list, but that the £310 was attributable to all the 1,400 shares.

Held (by James and Baggallay, L.JJ., *dissentiente* Thesiger, L.J.), that a direction *crediting B. with one-third of the £310 ought to be made, though there was [308 now no opportunity of altering the order as against A.

The costs of shorthand notes of evidence in the court below are not to be allowed as a matter of course upon an appeal, but only where a case is made for such allowance.

THIS was an appeal by William Walker from an order of the Master of the Rolls, dated the 1st of August, 1878, directing that Moses Walker should be included in the list of contributories of the Duchess of Westminster Silver Lead Ore Company in respect of 157 shares, William Walker in respect of 466, and Henry Walker in respect of 467.

The capital of the company was £15,000 in 15,000 shares

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of £1 each. The facts appeared to be that Henry Walker verbally agreed to take 1,400 shares on behalf of himself and his sons, Moses Walker and William Walker, to be equally divided between the three; that a few days afterwards Henry Walker, in the presence and with the concurrence of Moses and William, gave directions to the secretary that the shares should be allotted, 466 to William, 467 to Henry, and 467 to Moses; and the shares were entered in the books of the company accordingly and certificates for them given out. Before this occasion on which the three were present, Henry Walker had paid two sums of £200 and £110, making together £310, in respect of the shares. Subsequently a proposal was made by the Walkers that the shares should be cancelled and that 310 shares only should be issued to Moses Walker for the £310 which had been paid. This was accordingly done, but, as it appeared, without any authority.

An application by the official liquidator to place the three Walkers upon the list for 466, 467, and 467 shares respectively, having been adjourned into court, it was found that upon the affidavits there was a complete conflict of testimony, William Walker denying his ever having agreed to take shares, and both Moses and William denying that they were present when the direction to allot the shares as above was given, and almost every material fact being in dispute. The Master of the Rolls therefore tried the case on oral evidence, and came to the conclusion that the direction by the father in the presence of the two sons to allot the shares as above among the three was established. His Lordship was 309] *also of opinion that the cancellation of the shares was clearly invalid, but that nevertheless the £310 was to be treated as paid in respect of the shares allotted to Moses Walker, making 310 of his shares fully paid up, and leaving him liable only in respect of 167. The order was accordingly framed as above. William Walker gave notice of motion by way of appeal that so much of the order of the 1st of August, 1878, "whereby it was ordered that the said William Walker should be included in the list of contributories in respect of 466 shares, and that the said William Walker do pay to the official liquidator of the said company his costs of the said application in chambers and of the adjournment thereof into court, such costs to be taxed by the Taxing Master, may be discharged with costs or varied, or for such other order as to this honorable court may seem just."

Marten, Q.C., and Yate Lee, for the appellant, contended

on various grounds, which do not appear to call for a report, that William Walker could not be treated as a member; and that if he was a member in respect of one-third of the 1,400 shares he ought to be credited with one-third of the £310 which had been paid in respect of them.

Ince, Q.C., and *Lockwood*, for the official liquidator, were called upon the latter point only: The notice of appeal does not raise this point, and if it was intended to raise it, notice of appeal ought to have been served on Moses Walker, Order LVIII, rule 3; so that the order might be set right. Moses Walker has been credited with the whole of this sum, and that cannot now be altered.

Marten, in reply: The appeal being against the whole order, it was not necessary that the notice should specify this ground of complaint. It is against the spirit of Order LVIII, rule 2, to require notices of appeal to be so specific. William Walker is entitled to be credited with one-third of the £310, and is not to lose this right because Moses Walker has received a benefit to which he is not entitled.

*JAMES, L.J.: We see no reason to disturb the [310 decision of the Master of the Rolls that William Walker was fixed with a liability to take one-third of the 1,400 shares, but we think that he was entitled in justice to be credited with one-third of the £310 which had been paid on them. He is fixed on the ground of one interview at which he agreed to take one-third of the 1,400 shares in respect of which that sum had been paid. He had a right to say that that sum must be taken as paid in respect of all the shares, and nothing has been shown which could have the effect of depriving him of that right. The whole matter has been reheard before us, and we must make the order which in our judgment the Master of the Rolls ought to have made. Has the appellant lost his title to have that order set right? The application was made against him along with his father and brother, and he complains that his case was prejudiced by being mixed up with theirs. We have not given much weight to that consideration, but it is the right of the appellant to have his case tried by itself. The other brother has been allowed credit for the whole £310, and has thus gained a benefit of which he cannot be deprived, since the time for appeal has passed; but that is the official liquidator's own fault. The appellant gave his notice of appeal in due course against the whole order, and was not bound to give specific notice that he desired the order to be set right in such a particular as this. The order of the Master of the Rolls will, therefore, be varied by giving the appellant credit for one-

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third of the £310; but this will not affect the costs of the appeal, which must be paid by him.

BAGGALLAY, L.J.: The questions are, what order ought originally to have been made, and whether, having regard to the way in which the matter is brought before the Court of Appeal, the appellant is entitled to have the variation which he asks for made in the order. I agree with the Master of the Rolls that the appellant was bound by a concluded agreement to take one-third of the 1,400 shares, but I also think that he was entitled to have credit for one-third of the £310. Then as to the way in which the matter is brought 311] *before the Court of Appeal; the appellant appeals from the whole order and asks that it may be discharged or varied. This is wide enough to include such a variation as the giving him credit for one-third of the £310; the rights of the appellant cannot be affected by the circumstance that Moses Walker has obtained something that he was not entitled to, and that it is too late to deprive him of it.

THESIGER, L.J.: I agree in holding that the appellant is liable as a contributory in respect of the 466 shares; but as to the subsidiary point, I am unable to agree with the other members of the court. I admit that each of the three contributories was fully entitled to have his case treated separately, and that on this appeal we can only look at the evidence as far as it affects this particular appellant: but in considering whether we ought to interfere with the order of the Master of the Rolls, we must look at the position of the parties. Each party set up that he was not a shareholder, except that Moses Walker admitted himself to be the holder of 310 shares on which £310 had been paid. The Master of the Rolls seems to have treated the parties as bound *inter se* by the arrangement entered into by them when the attempted cancellation took place, though the arrangement was in other respects invalid. I think that he was hardly justified in doing so, and that he ought rather to have held that all parties were remitted to their original position. The point appears not to have been fully argued before the Master of the Rolls, but only touched on; still, if the appeal had been properly instituted, and all parties interested in it had been here, I think that the point might have been raised here. One order was drawn up in which the three cases are dealt with together, and the court therefore purported to do justice between all parties, and I cannot think that the question whether the £310 was properly dealt with is raised by this notice of appeal, which only seems to raise the question whether the appellant is a con-

tributory, and does not bring here all the parties interested in the question whether he is entitled to be credited with any part of the £310, which is an entirely separate question. According to Order LVIII, rule 2, the notice of appeal where part of an order is *complained of must specify such [312 part, and it appears to me that the appellant ought in this case to have specified that he appealed as to no part of the £310 being allowed him, and ought to have served the other parties.

Ince, Q.C., asked that the costs of the shorthand notes of the evidence below might be allowed.

Marten, Q.C., opposed.

JAMES, L.J.: I am of opinion that shorthand notes of the evidence ought not to be allowed as a matter of course, but only when a case is made for allowing them. Here no such case is made.

BAGGALLAY, L.J.: I am of the same opinion.

THESIGER, L.J.: In the common law divisions we have always been in the habit of using the judge's notes, and shorthand notes cannot be generally necessary.

Solicitors: *Le Riche & Son Layton; & Jacques.*

See ante, 268 note.

[10 Chancery Division, 313.]

C.A., Dec. 12, 19, 21, 1878.

**Ex parte* COOPER. In re BAUM.

[313]

Bill of Sale—Registration—Inventory of Goods with Receipt for Purchase-money attached—Act of Bankruptcy—Assignment of whole Property to secure pre-existing Debt—Equivalent—Forbearance by Grantee to enforce Judgment—Failure to prove alleged Fraud—Conts—Bills of Sale Act, 1854 (17 & 18 Vict. c. 36), ss. 1, 7—Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), ss. 6, 87.

An inventory of goods with receipt for purchase-money attached, the vendor remaining in apparent possession of the goods, is a bill of sale within the meaning of the Bills of Sale Act, 1854, and requires registration.

Allsopp v. Day ⁽¹⁾ distinguished.

Byerley v. Prevost ⁽²⁾ disapproved.

A trader on the 28th of August executed a bill of sale of substantially the whole of his property to secure a debt for which the grantee had recovered judgment on the 3d of July, and another debt which he owed the grantee. The grantor had on the 4th of July written a letter to the grantee, undertaking, in the event of his not issuing execution on the judgment, to execute to him on demand a bill of sale to secure the judgment debt and such other sums as he owed him. The grantee did not enter into any agreement not to enforce the judgment, but in fact he did not issue execution. On the 29th of August another creditor levied execution at the grantor's place of business, and on the 1st of September the grantor filed a liquidation petition.

⁽¹⁾ 7 H. & N., 457.

⁽²⁾ Law Rep., 6 C. P., 144.

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He had between the 4th of July and the 29th of August received by the carrying on of his business sums amounting to £10,000:

Held, that no equivalent had been given for the bill of sale, and that it was void as against the trustee in the liquidation.

Woodhouse v. Murray (1) followed.

Philps v. Hornstedt (2) disapproved.

An appellant who had failed in proving allegations of fraud, as to which he had adduced a mass of evidence, but who had succeeded on a point of law, was deprived of his costs.

IN this case there were two appeals from two orders made by Mr. Registrar Murray, acting as Chief Judge in Bankruptcy.

FIRST APPEAL.

The facts relating to the first appeal were as follows: John Baum was the proprietor of Cremorne Gardens, of which he held a lease, and at which he carried on the business of a licensed victualler and theatrical proprietor. His [314] private residence *was at No. 2 Clyde Street, South Kensington. On the 26th of May, 1876, he sold the furniture in his dwelling house to Mr. Alexander Isaacs for £600, and signed a receipt for the purchase-money at the foot of an inventory of the goods. On the outside cover of the inventory was written, "Inventory of the furniture, fixtures, and effects in No. 2 Clyde Street, South Kensington, the property of John Baum, Esq., purchased by Mr. Alexander Isaacs." The inventory was headed:

"Inventory of fixtures, furniture, and effects at No. 2 Clyde Street, South Kensington. The property of John Baum, Esq. Taken this 6th day of May, 1876."

Then followed an enumeration of the different articles in each room of the house, and at the foot of it was this receipt:

"Received this 26th day of May, 1876, of and from Mr. Alexander Isaacs, the sum of £600, being the amount of purchase-money in respect of the goods, chattels, plate, linen, and effects mentioned in the foregoing inventory.

"Witness: (Signed) John Baum.

"(Signed) W. H. Roberts, solicitor."

The purchase-money was paid. The deed was not registered as a bill of sale, and the property remained in the apparent possession of Baum until after he had, on the 1st of September, 1876, filed a liquidation petition. On the 29th of September his creditors resolved to accept a composition of 1s. in the pound. The resolution was confirmed and was registered, but the registration was subsequently vacated

(1) Law Rep., 2 Q. B., 634; Law Rep., 4 Q. B., 27.

(2) 1 Ex. D., 62.

by the court, on the ground that the assenting creditors had not acted *bona fide* in passing it. On the 5th of December, 1876, the registration not having been then vacated, Isaacs executed a deed of gift of the goods comprised in the inventory to a Miss Crouch, who was living with Baum and passing as his wife. After the registration had been vacated a fresh first meeting of the creditors was summoned, and a liquidation by arrangement was resolved upon. The trustee in the liquidation applied to the court to set aside the sale of the furniture on the ground of conspiracy and actual fraud, and also on the ground that the inventory and receipt ought to have been registered *as a bill of sale. There [315 was some evidence that before the 26th of May there had been negotiations between Baum and Isaacs respecting the purchase, and that Isaacs had given Baum £50 on account. Also that on the 26th of May possession of the goods was given to Isaacs by Baum delivering him a chair in the name of the whole, and that Isaacs verbally agreed to let the goods to Baum at a weekly rent. A great mass of evidence was adduced as to the alleged fraud. The Registrar held that the fraud had not been proved, and he held, on the authority of *Allsopp v. Day* (*) and *Byerley v. Prevost* (*), that the document of the 26th of May did not require registration. And he dismissed the trustee's application with costs. The trustee appealed.

SECOND APPEAL.

The additional facts relating to the second appeal were as follows:

On the 3d of July, 1876, Messrs. A. & H. Isaacs recovered judgment against Baum for £1,436 5s. 9d., debt and costs. On the 4th of July he wrote a letter to them as follows: "I undertake, in the event of your not issuing execution upon the judgment you have obtained against me for £1,436 5s. 9d., to execute to you on demand a mortgage of my furniture, fixtures and effects at Cremorne for that amount and such other sums as I owe you." Execution was not issued on the judgment. On the 5th of August, 1876, the solicitor of Messrs. Isaacs wrote to Baum as follows: "As you are aware, my clients, Messrs. Isaacs, have a judgment against you for upwards of £1,400, and are in a position to issue execution. I must therefore ask you at once either to pay the amount or give Messrs. Isaacs such security as I may approve." On the 28th of August, 1876, Baum executed a bill of sale in favor of Messrs. Isaacs. This deed contained

(*) 7 H. & N., 467.
26 ENG. REP.

(*) Law Rep., 6 C. P., 144.

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a recital of the judgment debt of £1,436 5s. 9d., and a recital that Baum was also indebted to Messrs. Isaacs, for moneys lent and advanced and for goods sold and delivered by them to him, in the further sum of £1,545 3s. 3d., making together £2,981 9s.; that Messrs. Isaacs, at the request of Baum, agreed to withhold execution under their judgment on his giving his undertaking to execute to them a bill of 316] *sale of his goods, fixtures, fittings, property, chattels, effects, and premises thereafter mentioned, for the whole amount in which he was indebted to them, whenever required by them so to do; and that Messrs. Isaacs had demanded payment of the judgment debt, or that Baum should execute such bill of sale as aforesaid, and Baum had accordingly agreed, in pursuance of his undertaking, to execute the assignment thereafter contained. And it was witnessed that, in pursuance of such agreement, and in consideration of the sum of £2,981 9s. so due to Messrs. Isaacs, Baum did thereby assign to Messrs. Isaacs all and singular the goods, fixtures, stock-in-trade, chattels, theatrical property, scenery, plate, linen, horses, carriages, harness, and effects in and about the hotel, theatre, and gardens called Cremorne, to hold the same to Messrs. Isaacs, subject nevertheless to the proviso for redemption thereafter contained (that is to say): Provided, nevertheless, that in case Baum should upon demand in writing by Messrs. Isaacs, or without such demand, pay unto them the sum of £2,981 9s., with interest, then and in such case the assignment thereby made should cease and be void. Provided also that in case Baum, upon such demand for payment being made, should neglect or fail to make such payment accordingly, then and in such case, and at any time thereafter, it should be lawful for Messrs. Isaacs to take possession of the property assigned, and to sell it and repay themselves the amount due to them. On the 29th of August a creditor named Leader put in an execution at Cremorne Gardens. The trustee applied to the court for a declaration that the bill of sale was fraudulent and void as against him. There was evidence that from the 4th of July to the 29th of August Baum had received as much as £10,000 for gate-money, i.e., payments made by visitors for entrance to the gardens. The Registrar refused the application. The trustee appealed.

FIRST APPEAL.

Swanston, Q.C., *Winslow*, Q.C., and *Nicholson*, for the appellant: On the evidence the Registrar ought to have come

to the conclusion that the charges of conspiracy and fraud had been proved.

*As to the question of registration, the judgments [317 of this court in the recent case of *Ex parte Odell* (*) show that *Allsopp v. Day* (†) was wrongly decided; and *Byerley v. Prevost* (‡) and similar cases have simply followed *Allsopp v. Day*. At that time it had not been held, as it has been since, that equitable assignments are within the Bills of Sale Act. There was no agreement for the sale to Isaacs before the inventory and receipt were signed; before that there had been nothing beyond negotiation, nothing more than that *quasi* preliminary agreement which there always is where negotiation has proceeded so far that the parties instruct a solicitor to prepare an agreement. The property in the goods passed by the instrument, and it ought to have been registered; and as the goods clearly remained in the apparent possession of Baum when the petition was filed, inasmuch as they were in the possession of Miss Crouch who passed as his wife, the trustee is entitled to them. In *Phillips v. Gibbons* (†) it was held that an instrument which recited sale of goods must be registered as a bill of sale, there being no other evidence of a sale. In *Brantom v. Griffiths* (‡), Cockburn, C.J., said: "Here there is an agreement to sell and purchase, amounting to a transfer *in presenti*, which is a bill of sale."

[THESIGER, L.J.: In *Thomson v. Barrett* (†) the question left to the jury was whether the receipt was a mere receipt, or whether it was intended to be a record of the transaction.]

Here the document was meant to be a record of the transaction.

E. C. Willis, and *Herbert Reed*, for Isaacs:

[JAMES, L.J.: You need not argue the question of fraud. We cannot differ on that point from the Registrar, who saw the witnesses, there being only the evidence of the debtor to prove the fraud, while it is denied by Isaacs and his solicitor. We cannot believe the debtor without disbelieving them.]

Except for the charge of fraud, Isaacs ought not to have been *made a respondent. He made over his interest [318 to Miss Crouch while the composition resolutions were standing. By force of these resolutions the debtor had become master of his property again, and Isaacs transferred the

(†) *Ante*, p. 76.

(‡) 7 H. & N., 457.

(§) Law Rep., 6 C. P., 144.

(*) 5 W. R., 527.

(†) 2 C. P. D., 212; 20 Eng. R., 475.

(‡) 1 L. T. (N.S.), 268.

goods to Miss Crouch without notice of any act of bankruptcy then available for adjudication against Baum.

[JAMES, L.J.: The act of bankruptcy remained available for adjudication, though no adjudication could be made so long as the composition resolutions stood.]

Before the trustee made any application to the court, Isaacs had in examination stated that he claimed no interest in the goods. In *Ex parte Hoare* (1) a debtor had, while composition resolutions were in force, executed a mortgage of part of his property, the mortgagee having notice of the liquidation petition under which the resolutions had been passed. The debtor failed to pay the composition and was afterwards adjudicated a bankrupt, the act of bankruptcy being the filing of the petition, and it was held by the Chief Judge that the mortgage was valid as against the trustee in the bankruptcy.

[JAMES, L.J.: There the composition was valid, though it afterwards failed through the default of the debtor; here the registration was vacated because the composition resolutions were not validly passed. Isaacs never had any title to the property.]

The principle is analogous to that which governs sales in market overt of goods obtained by fraud: *Cundy v. Lindsay* (2); *Horwood v. Smith* (3). In *In re Kearley and Clayton's Contract* (4) it was held that a purchaser from a compounding debtor is not entitled to require evidence that the instalments of the composition have been paid. As to the question of registration, *Ex parte Odell* (5) was quite a different case, and it did not overrule *Allsopp v. Day* (6). In the present case there was an actual delivery of the goods which gave a legal title to the purchaser; no other title was required. The principle of *Allsopp v. Day* applies. The fact that £50 had been previously paid on account shows [319] *that there was an antecedent bargain. A mere receipt for purchase-money need not to be registered as a bill of sale: *Hale v. Saloon Omnibus Company* (7). An agreement to execute a bill of sale does not require registration as a bill of sale unless it is relied upon as an equitable assignment: *Ex parte Mackay* (8); *Ex parte Homan* (9); *Branston v. Griffiths* (10). Here we rely for our title simply on the delivery of possession; not on the document, which is merely evidence of payment of the purchase-money. If the trans-

(1) Law Rep., 16 Eq., 625.

(2) 3 App. Cas., 459; 24 Eng. R., 345.

(3) 2 T. R., 750.

(4) 7 Ch. D., 615; 28 Eng. R., 759.

(5) *Ante*, 86.

(6) 7 H. & N., 457.

(7) 4 Drew., 492.

(8) Law Rep., 8 Ch., 643.

(9) Law Rep., 12 Eq., 598.

(10) 2 C. P. D., 212; 20 Eng. R., 475.

action was complete without any record, the fact that a record was made could make no difference; it would be mere surplusage.

[JAMES, L.J.: That might be said of every bill of sale.]

Generally, possession is not given at the time of execution. In the new Bills of Sale Act (41 & 42 Vict. c. 31), which is to come into operation on the 1st of January, 1879, sect. 4 expressly provides that the term "bill of sale" shall include "inventories of goods with receipt thereto attached." That shows that it was not supposed that they are included in the act of 1854. In *Evans v. Prothero* (¹), it was only held that a document purporting to be a receipt might be evidence of a contract to purchase, not that it was the contract. If this document requires registration as an agreement, it would follow that wherever there is an invoice of goods with a receipt for the purchase-money added to it, evidence cannot be adduced to show that the goods were not all delivered to the purchaser. *Byerley v. Prevost* (²) is a stronger case than *Allsopp v. Day* (³). And in *Graham v. Wilcockson* (⁴) some traders sold goods to their landlord under an arrangement by which the purchase-money was to be applied in payment of their rent which was in arrear. A memorandum of the sale was drawn up, and the goods were delivered to the landlord and then let by him to one of the vendors. It was held that the memorandum did not require registration as a bill of sale.

[THESIGER, L.J.: That is a very strong case, but it was really founded on *Byerley v. Prevost*.]

**E. C. Willis*, and *F. C. Willis*, for Miss Crouch. [320

Swanston, in reply: Isaacs is a necessary party independently of the case of fraud. He remained owner of the goods from the 26th of May to the 5th of December, and then he transferred them *pendente lite*, with notice of the act of bankruptcy. Any one who takes a bill of sale must be prepared within twelve months afterwards to defend his title. If any of the goods were disposed of while Isaacs remained the owner, he is responsible for their value. *Edwards v. Edwards* (⁵) is a clear authority that an equitable assignment must be registered as a bill of sale. In *Allsopp v. Day* (⁶), and most of the other cases relied upon by the respondent, the sale had been made before the document was signed.

(¹) 1 D. M. & G., 572.

(²) Law Rep., 6 C. P., 144.

(³) 7 H. & N., 457.

(⁴) 46 L. J. (Ex.), 55.

(⁵) 2 Ch. D., 291, 297; 16 Eng. R., 751.

Dec. 21. JAMES, L.J., delivered the judgment of the Court (James, Baggallay, and Thesiger, L.J.J.) as follows:

The question is, whether the document of the 26th of May was or was not a bill of sale or assurance of personal chattels requiring registration under the Bills of Sale Act. If it did require registration, there is no doubt that that possession was not taken which was necessary to give effect to the title of Mr. Alexander Isaacs, the respondent. The document in question, which is now before me, has on the outside of it this, which we consider to be part of the document itself, "Inventory of fixtures, furniture, and effects at No. 2 Clyde Street, South Kensington, the property of John Baum, Esq., purchased by Mr. Alexander Isaacs." Then inside there is a detailed inventory of all the furniture, followed by this: "Received this 26th day of May, 1876, of and from Mr. Alexander Isaacs, the sum of £600, being the amount of purchase-money in respect of the goods, chattels, plate, linen, and effects mentioned in the foregoing inventory." And this was signed by John Baum, and witnessed by W. H. Roberts, the solicitor who was present at the transaction. Now it appears to us that that document is as complete an "assurance" of the goods contained in it, and would be as effectual to give the title to and the right to possession of them for all purposes whatsoever, as if it had been extended in any amount of conveyancing language, engrossed on any number of skins of parchment, and sealed with any quantity of sealing-wax. It is a document which does assure the goods and does transfer them from the one person to the other. However, the difficulty suggested was this. It was said that such a conclusion would run counter to a series of decisions beginning with *Hale v. Saloon Omnibus Company* (¹), before Vice-Chancellor Kindersley, and to the principle of *Allsopp v. Day* (²) and other cases which have followed it, in which a receipt for purchase-money referring to property comprised in an inventory has been held not to be a bill of sale. In the recent case of *Ex parte Odell* (³), two members of this court expressed doubts as to the correctness of the decision in *Allsopp v. Day*. We do not, however, on the present occasion, think it necessary to go into any minute examination of *Allsopp v. Day*. There was this apparent distinction between that case and the present, that there the two documents, the inventory and the receipt, were not written on the same piece of paper, and did not together form the title to the property. The title was made out by means of parol evidence connecting

(¹) 4 Drew., 492.

(²) 7 H. & N., 457.

(³) *Ante*, p. 76.

the receipt with the inventory which was referred to in a letter containing the receipt. Nor is it necessary to criticise the other cases which followed *Allsopp v. Day*, because, so far as regards the general law, those cases have been entirely swept away by the new Bills of Sale Act (41 & 42 Vict. c. 31), which comes into operation on the 1st of January next, and by sect. 4 of which the Legislature have, either by way of declaration or by way of new enactment, expressly included "inventories of goods with receipt thereto attached" under the general definition of bills of sale. Though I do not think it necessary to go further into those cases, yet if, as has been pressed upon us in argument, the logical sequence of them is that such a document as the one before us is not an "assurance" requiring registration, we should be compelled to express our dissent from them, or at least our inability to follow the logical sequence with regard to this particular document. If such a *document as [322 this is to be held not to be an assurance requiring registration under the act, the result would be to make the act a mere plaything for verbal ingenuity active in exerting itself in the omission or in the introduction of immaterial words. We should, in fact, by a judicial decision establish a precedent for all persons how they could make a perfect and effectual bill of sale and yet not be subject to the provisions of the Bills of Sale Act. As to this particular document, I take it as it stands to be a bill of sale or assurance requiring registration, and therefore the title of Mr. Isaacs fails upon that ground. But this was only one of the points raised by the appeal; it is a mere point of law, and might have been taken in the court below without any great expense. Therefore we do not think it right, having regard to the nature of the other point which was also fought before the Registrar, to interfere with his order as to the costs before him. And, as that point was also insisted upon before us and has failed, we think that we ought to allow the appeal without costs.

SECOND APPEAL.

Swanston, Q.C., Winslow, Q.C., and Nicholson, for the appellant: The bill of sale was in effect an assignment of all the grantor's property to secure a pre-existing debt; the money taken at the gates was really included in it, for if the grantees had taken possession of what was expressly assigned, either no one would have paid for entrance into the gardens, or the grantees would have themselves received the

payments. The true test of the validity of such an assignment by a trader is whether the deed gives the grantee power to stop the grantor from carrying on his business. The forbearance of the grantees to issue execution upon their judgment was not a sufficient equivalent for the assignment. They did not bind themselves not to do so. And if they had issued execution and the goods had been sold, that would have been an act of bankruptcy, Bankruptcy Act, 1869, s. 6; and the other creditors could, under sect. 87, have intercepted the proceeds of sale. *Woodhouse v. Murray* (*) is 323] a clear authority that the forbearance *to issue execution was not a sufficient equivalent. If *Philps v. Hornstedt* (*) is not distinguishable, it is inconsistent with *Woodhouse v. Murray* (*). When there is no stipulation to make further advances, the fact that further advances have been made after the execution of the assignment will not support it: *Lindon v. Sharp* (*); *Bittlestone v. Cooke* (*).

E. C. Willis, and *Herbert Reed*, for Messrs. Isaacs: The present case is very different from *Woodhouse v. Murray*. There an execution which had been put in was withdrawn, and an assignment was made to the execution creditor of the goods which had been seized, and which comprised the whole of the grantor's property. The execution was an inchoate act of bankruptcy. Moreover, the grantor had ceased to carry on his business, and the forbearance of the grantee could not benefit the creditors. It is not the necessary result of an execution to give the property seized to the creditors; a bankruptcy or liquidation petition must be presented within fourteen days: Bankruptcy Act, 1869, s. 87; *Ex parte Villars* (*). The giving of time to the grantor was a sufficient equivalent for the assignment. In *Philps v. Hornstedt* only seven days' time was given, and it was held to be a sufficient equivalent. There was a reasonable expectation that Baum would be able to carry on his business, as indeed he did for nearly two months after the letter of the 4th of July was written. The bill of sale was given pursuant to the agreement contained in that letter. If the agreement was unilateral, still Baum in fact received a large sum of money in consequence of the forbearance of the grantees. A mere verbal agreement to make further advances followed by actual advances is enough: *Ex parte Winder* (*). The deed must be treated

(1) Law Rep., 2 Q. B., 634; Ibid, 4 Q. B., 27.

(*) 6 E. & B., 296.

(*) Law Rep., 9 Ch., 432; 9 Eng. R.,

(*) Law Rep., 8 Ex., 26; 1 Ex. D., 62.

531.

(*) 6 Man. & G., 895.

(*) 1 Ch. D., 290, 560; 15 Eng. R., 746.

as if it had been executed on the 4th of July: *Mercer v. Peterson* ('); *Harris v. Rickett* (').

*JAMES, L.J.: I am really unable to distinguish this [324 case from *Woodhouse v. Murray* ('). A person who has obtained a judgment, and has a right to levy execution, makes a bargain with his debtor, who says, "If you do not put in an execution, or if you do not go on with your execution, I will give you a bill of sale." There was no binding agreement to give up the judgment or the execution, and if there had been, it would make no difference whatever, because unless the decision in *Woodhouse v. Murray* is law, it seems to me that the provisions of sect. 87 would be rendered perfectly nugatory; anybody could laugh at them. Any debtor might say to a creditor "Do not sue me for such a number of days, or do not issue execution against me; if you will be kind enough, or if you will be forbearing, I will take care to let you know in good time, and I will give you a bill of sale of the whole of my property." A bill of sale comprising the whole property of the debtor is to be supported, because the creditor has given him time. As I said during the argument, I have scarcely ever known a case of the kind in which the bill of sale was not given upon an understanding, which was afterwards acted upon, that time should be given, because otherwise what equivalent would the grantor get for it? The whole thing would be a useless expense. The very object is that the grantor shall continue in possession of the property, and shall have some time, and often the time is mentioned. Probably the bill of sale is given contemporaneously with a bill of exchange, or something of that sort, but that circumstance has never been held to take the case out of the operation of the universal rule in bankruptcy, that where a man assigns the whole of his property in consideration of a past debt, that is a fraud upon the bankruptcy law, and therefore void. There is apparently some little inconsistency between the two decisions of the Exchequer Chamber, though the two cases were very different; but I very much prefer the decision in *Woodhouse v. Murray*, which commends itself to my sense and to my notion of the law, and is the decision which I should myself have given if the case had come before me for the first time. The appeal will be allowed.

*BAGGALLAY, L.J.: I am entirely of the same opinion. [325 It could not be contended under the circumstances of this case that the bill of sale of the 28th of August was not an

(') Law Rep., 2 Ex., 304; Law Rep., 3 Ex., 105.

(') 4 H. & N., 1.

(') Law Rep., 2 Q. B., 634; Law Rep., 4 Q. B., 27.

act of bankruptcy, unless there was what has been properly called an "equivalent" for it. I entirely assent to what has fallen from the Lord Justice James with reference to *Woodhouse v. Murray* (*). I think the principle of that case is exactly applicable to the present. I will only observe with regard to *Philps v. Hornstedt* (*), that the court was of opinion upon the facts that there had been that which did amount to an "equivalent" for the bill of sale, and on that ground the judgment can be supported. If it is in conflict with *Woodhouse v. Murray*, the latter appears to me to be more in accordance with the law which is applicable.

THESIGER, L.J.: I also am of opinion that the present case is entirely undistinguishable from *Woodhouse v. Murray*. There the consideration for the deed which was alleged to be an act of bankruptcy was the withdrawal of an execution. There that which is here suggested on behalf of the respondents was found as a fact by the jury, viz., that the deed was executed with the honest and *bona fide* intention of preventing the expense and the sacrifice of property which would have resulted from the creditor's retaining possession of the goods and enforcing by a sale his rights under his judgment and execution. But, notwithstanding that finding of the jury, the court held that the deed constituted an act of bankruptcy. It is said, however, in order to distinguish that case from this, that in *Woodhouse v. Murray* there had been a seizure under the execution, and therefore an inchoate act of bankruptcy. But I cannot trace in the considered judgement of the Court of Exchequer Chamber anything to show that they decided the case upon that narrow ground. What they did base their decision upon was this, that, inasmuch as an execution for more than £50 might, if it was proceeded with, result in 326] bankruptcy, any agreement by which the *whole of the debtor's property is given up in consideration of the execution being withdrawn is an act of bankruptcy, and cannot be supported in the event of bankruptcy taking place. But it is said that *Philps v. Hornstedt* (*) (which was also a decision of the Exchequer Chamber) is contrary to the view taken in *Woodhouse v. Murray* (*), and is at all events an authority in favor of the respondents. It is very difficult to distinguish the two cases, but if they cannot be distinguished, *Philps v. Hornstedt* is clearly contrary to the principle of *Woodhouse v. Murray*, and, that being so, and both of them being decisions of a court of co-ordinate jurisdic-

(*) Law Rep., 2 Q. B., 634; Law Rep., 4 Q. B., 27.

(*) Law Rep., 8 Ex., 26; 1 Ex. D., 62.

tion with our own, I prefer to follow that decision, which is founded upon facts almost indetical with those of the present case, to that which proceeded upon very different facts.

I wish to make one other observation. It is suggested that not only was there an arrangement by which profit might be obtained to the estate of the bankrupt, but that he did obtain that profit to a very large amount subsequently to the date of the original agreement, under which it is alleged that the execution was not put in force. I find that the same thing existed in *Lindon v. Sharp* (¹). There, not only was there an expectation that further advances would be made, but after the agreement between the parties advances to a considerable extent were made. But, notwithstanding that fact, it was held that, inasmuch as there was not any binding agreement that advances should be made (just as here there was no binding arrangement which would have prevented the execution being issued almost the very next day after the agreement had been entered into), the advances actually made, although they had in fact profited the bankrupt, were not sufficient to prevent the deed from constituting an act of bankruptcy.

Solicitors for appellant: *Evans & Eagles*.

Solicitor for respondents: *W. H. Roberts*.

(¹) 6 Man. & G., 895.

[10 Chancery Division, 327.]

V.C.B., Nov. 22, 23, 26, 29, 30; C.A., Dec. 2, 3, 1878: Jan. 11, 1879.

*FLOWER V. LLOYD.

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[1877 F. 109.]

Action to impeach Judgment as obtained by Fraud.

The plaintiffs brought an action against the defendants to restrain alleged infringements of a patent process for printing on metal plates. The plaintiffs printed from dry lithographic stones put into relief. The defendants alleged that they the defendants printed by the ordinary damp lithographic process from flat stones. Pending the proceedings, an order was made by the Court of Appeal that an expert named by the plaintiffs and not objected to by the defendants, should be at liberty to inspect the defendants' process, and the defendants gave an undertaking to show him the whole process. The inspector examined the process, and was shown twenty-seven stones used by the defendants, and reported to the effect that the defendants' mode of printing was the same as the ordinary process of lithography, except that tin was used instead of paper. The action being tried on these materials was ultimately dismissed by the Court of Appeal. The plaintiffs shortly afterwards commenced an action to have it declared that the judgment on the appeal had been obtained by fraud, and for consequential relief. The alleged fraud was that the defendants, when the inspection took place, had in use not only the above twenty-

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seven stones, but also stones on which the designs were placed in relief—that they removed such latter stones from the place where the inspection took place, in order to conceal from the inspector the fact that they had stones on which the design was in relief—that they falsely stated to the inspector that they had no other stones than those shown to him—and that the defendants stated to the inspector that the ink used by them was ordinary lithographic ink, whereas in fact they used ink specially prepared for the plaintiffs' use by a particular manufacturer for printing by the dry process. Bacon, V.C., considered the case of fraud proved, and made a decree in the plaintiffs' favor, but the Court of Appeal was of opinion that no fraud was proved, and dismissed the action.

Per James and Thesiger, L.JJ., *dissentiente* Baggallay, L.J.: *Semble*, that an action to impeach a judgment on such grounds was not maintainable.

THIS was an action to have it declared that the judgment in a former action between the same parties had been obtained by fraud, and for relief consequent on that declaration.

In the former action the plaintiffs sought an injunction and damages for an alleged infringement of letters patent of 1864 and 1869, for improved methods of printing and decorating metal plates. Vice-Chancellor Bacon gave judgment for the plaintiffs, but on the 18th of May, 1877, this judgment 328] was reversed by the *Court of Appeal, and the action dismissed with costs. In the course of the proceedings an inspection of the defendants' process took place under an order of the Court of Appeal, and the fraud alleged in the present action was that the defendants wilfully and with corrupt intention deceived and misled the inspector. The Vice-Chancellor considered this to be established, and on the 20th of February, 1878, gave judgment in the present action, declaring that the judgment of the 18th of May, 1877, had been obtained by fraud, and ordering that all further proceedings to enforce that judgment should be stayed, and that the defendants should pay the costs of the present action.

The process expressed to be protected by the patent of 1864 was considered by the court to be the printing by the dry process from a lithographic stone put into sufficient relief to enable the dry process to be used and the impressions to be worked off rapidly. The case made by the defendants was that they the defendants printed by the ordinary process of lithographic printing, viz., the damp process, in which the stone is not put into relief, but is wetted, which prevents the ink from adhering to those parts of it which are not covered by the pattern, and that the printing on metal plates from damp stones was not novel in 1864.

The plaintiffs contended that the process patented by them in 1869 was a combination of four subordinate processes, namely, printing, drying, varnishing, and again drying, that

the defendants had adopted the last three of these processes, and that the damp process of printing from a flat stone was a mere colorable imitation of the first process, which was printing from a dry stone put in relief.

The plaintiffs, after joining issue in the action, obtained an order from the Vice-Chancellor authorizing them with their manager and a skilled witness to inspect and examine the defendants' process. The defendants appealed, and an order was made that Mr. Imray and Mr. Carpmael, two skilled persons named by the plaintiffs and not objected to by the defendants, should inspect the defendants' process, the defendants by their counsel giving an undertaking to show the whole process.

Mr. Carpmael was unable to attend, and the inspection was made by Mr. Imray alone. On the 10th of July, [329 1878, he made a report stating that at the defendants' works he was shown three presses, two of which were at work; that the matrix used in them was the ordinary lithographic stone with the design drawn upon it in thick black ink; that the stones were flat except the almost inappreciable thickness of the ink, so that when an inking roller was passed over them in a dry state it inked the whole surface of the stone. He further stated that he had examined all the lithographic stones shown to him to the number of twenty-seven, and found them to be the same as those in the presses, and was told that there were no other forms or matrixes of any kind used in the establishment, and that the ink used was ordinary lithographic ink thinned down in the usual way by varnish, both ink and varnish being supplied by a person named Winstone. He described the way in which the tin plates when printed were dried, varnished, and again dried, and stated that he was informed by the persons present that he had witnessed the complete process, and that he saw no reason to doubt the truth of that representation. At the trial, in answer to a question by the defendants' counsel, he said that the defendants' process of printing was the same as the ordinary process of lithographing on paper, except that tin was used instead of paper.

At the trial Vice-Chancellor Bacon adopted the plaintiffs' contention that their process consisted of four subordinate processes, of which the defendants had adopted the latter three, and used a colorable variation of the first, his Lordship being of opinion that the defendants had not made out that printing from damp stones on metal plates was not novel in 1864. Judgment was accordingly given for the

plaintiffs, but this judgment was reversed by the Court of Appeal, and the bill dismissed with costs. An application to have the appeal reheard upon further evidence was afterwards refused⁽¹⁾.

On the 14th of July, 1877, the plaintiffs commenced the present action, on the ground of fraud alleged to have been committed by the defendants in connection with Mr. Imray's inspection. The case made was that at the time of the inspection the defendants had in their possession not only the 330] twenty-seven lithographic stones which *were shown to him and which were referred to in his report, but also a large number of other stones on which the designs were placed in relief by the spaces being eaten out with acid, and that prior to Mr. Imray's visit the defendants, with the object of concealing such last-mentioned stones from his inspection, removed them from the portion of their premises which alone was inspected by him, and further, that they purposely deceived and misled him by telling him that no stones, forms, or matrixes of any kind were used by them for decorating plates other than the twenty-seven stones which were shown to him; that instead of the ink used by the defendants being ordinary ink supplied by Winstone, they had been in the constant habit for some time previously to the commencement of the former action of obtaining ink from a manufacturer named Storr, who prepared ink specially for the plaintiffs; that such ink was supplied in vessels to each of which was attached a label having printed thereon in large letters the words "prepared expressly for direct printing on tin," and that prior to the inspection the defendants carefully removed the labels from all such vessels with the object of concealing from Mr. Imray the falsehood of the representation that the ink used by them was ordinary lithographic ink prepared by Winstone; and the plaintiffs charged that the Court of Appeal as well as Mr. Imray were deceived and misled by such fraudulent conduct of the defendants.

The defendants admitted that at the time of the inspection they had a number of stones other than the twenty-seven which were shown to Mr. Imray, and that shortly before his visit such stones were removed from the portion of the premises where his inspection took place; but they denied that any fraud was intended in such removal and stated that the twenty-seven stones which were shown to Mr. Imray fairly and fully represented the nature and state of preparation of every stone used in their establishment. That all the stones removed

(1) 6 Ch. D., 297; 22 Eng. Rep., 824.

(except one which was included by accident) bore on them the names or some other indication of their customers, and that their only purpose in removing the stones was to prevent the disclosure to the plaintiffs of the names of their customers, from which they apprehended serious injury to their business. They denied having stated to Mr. Imray that no other *stones than the twenty-seven were [33] used in their business, and they said the statement made was that they had no stones of any kind different from those, and they also denied having made any false statement about the ink used by them.

The Vice-Chancellor considered the fraud established, and made an order to the effect stated above.

The defendants appealed, and the appeal came on for hearing on the 22d of November, 1878.

Sir H. Jackson, Q.C., Marriott, Q.C., Seeley, and De Castro, for the appellants, entered into an examination of the evidence, and contended that no case of fraudulent concealment on the part of the defendants was made out.

Kay, Q.C., Aston, Q. C., and Macrory, for the plaintiffs: Where any fraud or surprise upon the court is proved, the court will set aside a decree and remit the parties to their rights: *Richmond v. Tayleur* ('); *Kennedy v. Daly* ('); *Brooke v. Lord Mostyn* ('). A fraud of this kind is committed when a person whose duty it is to put proper materials before the court does not do so. The material part of the process is the putting the design into relief, and here stones which were in relief were removed, and a false statement made as to the ink with the intention of concealing the true nature of the process used.

Sir H. Jackson, in reply: The court will not set aside a decree and remit parties to their rights merely because there has been a suppression of something which had better have been disclosed, unless the fact suppressed is of vital importance or the suppression has been made with a fraudulent intent. I admit that the withdrawal of the stones was imprudent, and if the defendants had asked my opinion I should have advised them to show every stone they had; but there was no fraudulent intent, and the non-production of stones which had a somewhat greater degree of relief, produced accidentally by user, than the stones which were exhibited is not material, it being *clear on the evi- [332] dence that these stones were not put into relief so as to be adapted to printing by the dry process.

(¹) 1 P. Wms., 734, 736.

(²) 1 Sch. & Lef., 355, 374.

(³) 33 Beav., 457; 2 D. J. & S., 373; Law Rep., 4 H. L., 304.

Jan. 11, 1879. BAGGALLAY, L.J., delivered the judgment of the Court (James, Baggallay, and Thesiger, L.JJ.), and after entering into a careful examination of the evidence and stating the reasons of the court for coming to the conclusion that the evidence of a witness who stated that one of the defendants had directed him to remove the stones before Mr. Imray's inspection, as it would not do to let him see any stones so deeply indented, was not to be credited; that the use of Storr's ink had been discontinued before the inspection—that it was not established that the defendants had stated to Mr. Imray that no other stones than the twenty-seven were used by them—and that although some of the stones which had been removed were in relief according to the ordinary meaning of the term, i.e., in a relief which could be appreciated by the touch or by the eye, they were what would be called "lithographically flat," a term used to denote a stone which, though put into slight relief by the repeated use of the acid employed in cleaning the stones is for the practical purposes of lithography a flat stone, concluded as follows:

It only remains for us to say that having very carefully examined the evidence which has been brought under our consideration, we have arrived at the following conclusions, viz., that the charges of fraud made by the plaintiffs against the defendants have not been substantiated; that the orders given by the defendants previously to Mr. Imray's first inspection, for the removal of the stones which were not produced to him, were not given for the purpose of concealing any part of the process which they had actually used or were then actually using, but with the sole object, as stated by them, of preventing the names of their customers becoming known to the plaintiff; that the whole of the defendants' process was fairly and fully shown to Mr. Imray on his first and subsequent inspections in 1876; that his description of such process in his report was perfectly accurate; that the defendants have never decorated metal plates by any other process than that so described, which is the ordinary damp lithographic process; that the stones which were 333] *removed in no respect differed in character or nature of preparation from those which Mr. Imray first saw, though, under the circumstances to which we have adverted, some of them had been put in more relief than others by reason of their having been more often etched or cleaned; that if every stone which had been removed had been produced to Mr. Imray and examined by him on the 10th of July, 1876, though his report might have been va-

ried in terms it could not with propriety have been to any other effect in substance, and that the judgment of the Court of Appeal of the 18th of May, 1877, a stay of proceedings under which has been ordered by the Vice-Chancellor, must have been equally adverse to the plaintiffs.

Under these circumstances the judgment of the Vice-Chancellor must be reversed, and judgment given in favor of the defendants, with the usual consequences as to costs.

JAMES, L.J. I have to add some observations which have been seen by the Lord Justice Thesiger and in which he concurs. We have thought it right and due to the defendants to go through the allegations made against them; and their counsel, in fact, scarcely asked for any judgment except one based on their acquittal of the fraud charged against them. But we must not forget that there is a very grave general question of far more importance than the question between the parties to these suits. Assuming all the alleged falsehood and fraud to have been substantiated, is such a suit as the present sustainable? That question would require very grave consideration indeed before it is answered in the affirmative. Where is litigation to end if a judgment obtained in an action fought out adversely between two litigants *sui juris* and at arm's length could be set aside by a fresh action on the ground that perjury had been committed in the first action, or that false answers had been given to interrogatories, or a misleading production of documents, or of a machine, or of a process had been given? There are hundreds of actions tried every year in which the evidence is irreconcilably conflicting, and must be on one side or other wilfully and corruptly perjured. In this case, if the plaintiffs had sustained on this appeal the judgment in their favor, the present defendants, in their turn, might [334 bring a fresh action to set that judgment aside on the ground of perjury of the principal witness and subornation of perjury; and so the parties might go on alternately *ad infinitum*. There is no distinction in principle between the old common law action and the old chancery suit, and the court ought to pause long before it establishes a precedent which would or might make in numberless cases judgments supposed to be final only the commencement of a new series of actions. Perjuries, falsehoods, frauds, when detected, must be punished and punished severely; but, in their desire to prevent parties litigant from obtaining any benefit from such foul means, the court must not forget the evils which may arise from opening such new sources of litigation, amongst such evils not the least being that it would be cer-

tain to multiply indefinitely the mass of those very perjuries, falsehoods, and frauds.

BAGGALLAY, L.J.: With reference to the observations which have just been made by the Lord Justice, I only wish to state that, whilst I am fully sensible of the evils and inconveniences which must arise from re-opening what are apparently final judgments between litigant parties, I desire to reserve for myself an opportunity of fully considering the question how, having regard to general principles and authority, it will be proper to deal with cases, if and when any such shall arise, in which it shall be clearly proved that a judgment has been obtained by the fraud of one of the parties, which judgment, but for such fraud, would have been in favor of the other party. I should much regret to feel myself compelled to hold that the court had no power to deprive the successful but fraudulent party of the advantages to be derived from what he had so obtained by fraud.

Solicitors: *W. & J. Flower & Nussey; G. & K. Fisher.*

See 22 Eng. Rep., 828 note; 7 Am. Rep., 136 note.

As to how far a suit in equity will lie to obtain relief from a judgment fraudulently obtained, see *Verplanck v. Van Buren*, 76 N. Y., 257 *et seq.*

As to how far a witness is liable on the ground that his testimony was found in perjury, see *Verplanck v. Van Buren*, 76 N. Y., 257 *et seq.*; *Sailesbury v. Creswell*, 14 Hun, 460.

See in Minnesota, by statute, *Wieland v. Shillock*, 24 Minn., 345.

Non-payment by a receiver, pursuant to order, made after a receiver's removal ordering him to pay a certain sum, "being balance of trust funds in his hands." The surety is liable for the amount ordered to be paid, although not a party or privy to the proceeding resulting in the order.

The surety cannot defend, either wholly or in part, on the ground that the receiver before the execution of the bond had disposed of, or since its execution had properly disbursed, the whole of the trust funds or a part thereof, so that the whole of the sum mentioned in the order was not at its date in his hands: *Thomson v. McGregor*, 45 N. Y. Superior Court Rep., 197.

A surety on a replevin bond can make no objection to the form of pro-

ceeding against his principal. The principal alone is responsible for the defence, and, if he waive technical or substantial objection to the manner and form of proceeding against him, the surety on his bond is bound by the result of the litigation on its merits: *Greenlaw v. Logan*, 2 Lea (Tenn.), 185.

Sureties on a replevin bond can enjoin the prosecution of a suit thereon where their principal, without their knowledge, has stipulated that the defendant may take judgment.

Sureties are concluded by a regular judgment against their principal, but not by a secret confession of judgment fraudulently and collusively made between their principal and the obligee: *Wright v. Hake*, 38 Mich., 525.

A court of chancery will not entertain a party seeking relief against a judgment at law, in consequence of his default, upon grounds which might have been successfully taken in the court of law, unless some reason founded in fraud, accident, surprise or some adventitious circumstance, beyond the control of the party, be shown why the defence at law was not made.

Courts of equity always grant relief in such cases, when it is shown that the reason why the defence at law was not made is founded in fraud, acci-

dent, surprise or some adventitious circumstances beyond the control of the party.

Where a defendant, who had an adequate defence at law, has been prevented from resorting to it by a fraudulent representation or promise by the plaintiff that he would take no judgment against him, and he need not employ counsel, he will be relieved in a court of equity.

Where a bill shows a case for the interference of a court of equity, on the ground that the action at law was not defended because the plaintiff had promised to take no judgment against the party, and assured him it was unnecessary to employ counsel, and the bill further shows that a plea was put in by counsel for the defendant without any allegation that such appearance was unauthorized, the bill is fatally defective: *Knapp v. Snyder*, 15 West Va., 434; *Sailesbury v. Creswell*, 14 Hun, 460; *Darling v. Mayor*, 51 Md., 1.

In a replevin suit brought by M. against C. H., after a dissolution of his partnership with C. H., Jr., alleging fraud in obtaining the goods replevied, a judgment was given for C. H. Afterwards, in trover against C. H. Jr. for the same goods (additional evidence of the fraud having been discovered), M. obtained a verdict. An injunction was thereupon issued, restraining C. H. from further proceedings on a judgment obtained by default by C. H. against M. and his sureties on the replevin bond. Held that the injunction ought to have been refused—(1) Because the bill did not show *when* the additional evidence of fraud was discovered, and that it was too late to apply at the same term of court (as required by rule) for a new trial in the replevin suit, and (2) That such evidence was material, relevant and not cumulative: *Hannon v. Maxwell*, 81 N. J. Eq., 318.

It is not sufficient, to authorize a court of equity to restrain the execution of a judgment, to show that the claim upon which the judgment was obtained was unfounded, or that the court erroneously decided the law; nor is it sufficient to show that there was a good defence to the action of which the defendant omitted to avail himself,

if before the judgment was rendered the facts were known to him, or might by the exercise of reasonable diligence have been ascertained: it must appear that the omission was the result of fraud or accident, unmixed with any fault or negligence upon his part: *Stillwell v. Carpenter*, 59 N. Y., 414, reversing 1 T. & C., 615; 1 High on Inj. (2d ed.), § 113.

Equity will relieve against a judgment obtained against a defendant by a fraudulent combination between his co-defendants and the plaintiff; but this jurisdiction is rarely and reluctantly exercised. The case ought to be a very plain one to authorize interference: *Ritter v. Democratic*, etc., 68 Mo., 458.

A party to the record may have a judgment reviewed for fraud practised in obtaining the judgment; but he may not, though a stranger to the record may, have the judgment reviewed for fraud in the cause of action. Fraud practised upon a defendant, by a co-defendant, in allowing judgment to go against both, is not ground upon which the former may have the judgment reviewed: *State v. Holmes*, 69 Ind., 577.

Fraud or mistake on the part of an executor or administrator in making final settlement of his trust is ground sufficient for re-opening such settlement: *Miller v. Steele*, 64 Ind., 79.

Where a guardian has perpetrated a fraud in the settlement of his account, the limitation in the act of Oct. 13, 1840, begins to run from its discovery by the injured party, and not from the confirmation of the guardian's account: *Kuhn's Appeal*, 87 Penn. St. R., 100.

Fraud practised in the recovery of a judgment cannot be pleaded in an action on the judgment, prosecuted in another state, unless such defence could be made in the courts of the state where the judgment was rendered: *Barras v. Bidwell*, 3 Woods, 5.

Where parties, in pursuance of a conspiracy or combination for that purpose, fraudulently make use of legal proceedings to injure another, an action lies against them, at the suit of the person injured, to recover the damages sustained: *Verplanck v. Van Buren*, 76 N. Y., 247.

[10 Chancery Division, 335.]

V.C.B., Dec. 5, 1878. C.A., Jan. 22, 29, 1879.

335] *In re STOCKTON IRON FURNACE COMPANY.

Mortgagor and Mortgagee—Attornment Clause—Judicature Act, 1873, s. 10—Bills of Sale Act, (17 & 18 Vict. c. 36)—Appeal from Order in Winding-up—Amending Notice of Appeal—Rules of Court, 1875, Order LVIII, rr. 3, 4.

A limited company gave, in 1875, a mortgage to its bankers for its account current, by covenant to surrender its copyhold works, and by the mortgage deed the company became tenant to the bankers at the rent of £5,000. No surrender of the copyholds was made. On the 16th of July, 1877, the bankers sent an auctioneer to distrain for £10,000, being two years' rent. The auctioneer, on the same day, saw the managing director of the company, gave him formal notice of distraint, and by arrangement with him employed two workmen of the company to keep possession of the chattels distrained. On the 18th of July the company requested the bankers not to proceed to an immediate sale, to which the bankers assented, and the two men remained in possession. On the 19th of July a petition was presented for winding-up the company; and on the 28th of July a winding-up order was made. By arrangement with the liquidator, the men went out of possession in October, and in November the bulk of the chattels was sold by the liquidator without prejudice to the rights of the bankers, and realized less than £5,000:

Held, by Bacon, V.C., that under the Judicature Act, 1873, s. 10, the rights of the parties were the same as in bankruptcy; that the attornment clause was intended to give the mortgagees a remedy in the event of bankruptcy, and was a fraud on the bankrupt laws; that, moreover, a seizure by a secured creditor by a distress not perfected by sale before the bankruptcy was void as against the general body of creditors; and that the proceeds of sale belonged to the liquidator:

Held, further, that the case came within the doctrine of reputed ownership.

Held, on appeal, that the attornment clause created the relation of landlord and tenant; that there being no ground for saying that the rent of £5,000 was so unreasonable as to be fraudulent, the mortgagees had the same rights of distress as any other landlord; and that, as the value of the chattels sold was less than one years' rent, on the mortgagees abandoning all claim to the chattels remaining unsold, the proceeds of sale must go to them.

Ex parte Williams ⁽¹⁾ distinguished.

Held, also, that the doctrine of reputed ownership had no application, as a distress does not make the landlord the owner of the goods distrained.

Seemle, that where a mortgage contains an attornment clause the mortgagee is liable to wilful default in respect of the rent as being in possession.

336] *Held*, that the order of the Vice-Chancellor was not an interlocutory *order; and that the proper notice of appeal was a fourteen days' notice; but a four days' notice having been given, the court allowed it to be amended.

The Court of Appeal has full discretion, under Rules of Court, 1875, Order LVIII, rule 3, to allow a notice of appeal to be amended as to dates or otherwise, and special circumstances are not required to justify such amendment.

By an indenture of mortgage dated the 23d of February, 1875, and made between the Stockton Iron Furnace Company, Limited, of the one part, and Edmund Backhouse and five other persons, who carried on business as bankers at Darlington under the firm of Jonathan Backhouse & Co., of the other part, in order to secure the balance of the company's account

(1) 7 Ch. D., 138; 23 Eng. Rep., 469.

with the bankers to an amount not exceeding £50,000, the company covenanted with the parties of the second part to surrender certain parcels of copyhold land on which their works were carried on, "and also all the works, buildings, and erections now erected or being on the said pieces or parcels of ground, and also all such engines, furnaces, fixed machinery, implements, and utensils in, upon, or belonging to the said several pieces or parcels of land, buildings, and premises respectively, or any of them, or any part thereof, as are affixed to the inheritance of the said copyhold premises and are of the nature of real estate," to the use of the parties of the second part and their heirs, subject to a condition for making void the surrender corresponding with the proviso for redemption thereafter contained. The proviso for redemption was, that if the company or their assigns should, on demand by the parties of the second part, or the survivors or survivor of them, or the executors or administrators of such survivor, their or his assigns, made to the company or their assigns, or without such demand having been made, pay to the parties of the second part all moneys which might for the time being be owing by the company or their assigns on their account current with the bank or otherwise for the bills and notes discounted and paid and for other loans, credits, or advances made to or for the accommodation or at the request of the company or their assigns, and for interest, commission, and other lawful charges, together with (in the case of such demand as aforesaid having been made) interest on the balance due from the day of such demand having been made till the actual payment thereof *at the rate of £ per cent. per [337 annum, the parties of the second part would reconvey the premises "thereinbefore assigned, or intended so to be," to the company or their assigns. The deed contained no assignment of any chattels. It contained a covenant for payment on demand of the balance of the account with interest; a covenant not to pull down or remove the buildings, furnaces, steam-engines, boilers, fixtures, machinery, implements, utensils, or other the premises thereinbefore assigned, without the permission of the mortgagees; and an agreement that "all furnaces, engines, fixed machinery, and implements which shall be erected, placed, or used upon the said premises hereinbefore covenanted to be surrendered, or any part thereof," during the continuance of the security, either in lieu of or in addition to "any buildings, furnaces, engines, machinery, and implements now standing or being there," should be included in the security. There was a

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power enabling the mortgagees at any time thereafter to sell "the said premises hereinbefore expressed to be assigned and covenanted to be surrendered respectively," with a stipulation that the power should not be exercised until default in payment for one calendar month after notice, with the usual clause exonerating purchasers from seeing that notice had been given. It was declared that the deed was intended to be a security for the balance for the time being owing on the account current of the company, or their assigns, with the bank, by whatsoever persons the business of the bank might for the time being be carried on; and that the total amount of money to be recoverable under the deed should not exceed £50,000.

The deed also contained the following clause: "And this indenture further witnesseth, that in pursuance of the said recited agreement, and for the consideration aforesaid, the said company do hereby attorn and become tenants from year to year to the said persons parties hereto of the second part, their heirs and assigns, for or in respect of the said mortgaged premises, at the yearly rent of five thousand pounds clear of all deductions, to be paid by equal half-yearly payments on the twenty-third day of August and the twenty-third day of February in every year, the first half-yearly payment thereof to be made on the twenty-third day of August next: Provided always, and it is hereby 338] *declared, that it shall be lawful for the said persons parties hereto of the second part, their heirs and assigns, at any time after the said twenty-third day of August next, without giving previous notice of their intention so to do, to enter upon and take possession of the hereditaments and premises whereof the said company have attorned and become tenants as aforesaid, and to determine the tenancy created by the aforesaid attornment, and put out and expel the said company from the said hereditaments and premises without any ejectment or other legal process as effectually as any sheriff might do in case the landlords had obtained judgment in ejectment for recovery of such possession, and a writ *habere facias possessionem* had issued on such judgment directed to such sheriff; and in case of such entry and any action brought, the defendants or defendant may plead leave and license in bar thereof, and this indenture may be used as conclusive evidence of the leave and license of the said company."

The deed was not registered under the Bills of Sale Act, 1854, nor was any surrender of the copyholds made.

On the 13th of July, 1877, the directors of the company

issued a circular to their customers and creditors, stating that they were compelled to suspend payment; and on the same day notices were given by the company to their workmen that their services would not be required at the expiration of a fortnight.

On the 14th of July, 1877, which was Saturday, a writ was served on the company on behalf of John Fleming, a creditor of the company, whose debt was stated by him to amount to £8,273 11s. 5d.

On the 16th of July, 1877, Joseph Bradley, an auctioneer, received from the solicitors of the bank authority to distrain for £10,000, being two years' rent under the attornment. On the same day Bradley went to Mr. Byers, the managing director of the company at the works, and informed him that he (Bradley) had come to distrain, and must keep a man constantly in possession; and being, as he stated, of opinion that it was desirable that the men placed in possession should be men who were usually employed about machinery and ironworks, he asked Mr. Byers whether there were any trustworthy men on the works whom he could engage for that purpose. Mr. Byers recommended two men, *Lloyd and Ramsey. Bradley thereupon gave [339 formal notice of distraint to Mr. Byers, and engaged Lloyd and Ramsey to be in possession, and told them, as he said, to remain in possession on behalf of Messrs. Backhouse & Co. till further order. It was disputed, however, whether he told them on whose behalf they were to keep possession, and they continued to work for and receive wages from the company. He at the same time gave to them the distress warrant in a closed envelope, and told them that if anybody asked for their authority they were to show it to them, and refer them to him (Bradley) for anything further. The men accordingly remained in possession, one by day and the other by night, until the 6th of October.

On the 18th of July Mr. Byers, by the direction of the board of directors, wrote to the bankers, asking them not to proceed at once to a sale, but to keep possession without prejudice to any of their powers or remedies under the mortgage.

The firm of solicitors who instructed Bradley were at that time acting for both the company and the bankers, and Bradley's appointment as bailiff was in all respects regular.

On the 19th of July a petition was presented for the winding-up of the company, and an injunction was obtained restraining Fleming from execution; and on the 28th of July following a compulsory order was made. On the 2d of Au-

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gust following James Eddy was appointed official liquidator. In October an arrangement was come to between the bank and the liquidator that in order to save expense the men should be withdrawn from possession, the liquidator undertaking that the rights of the bank should not thereby be prejudiced, and on the 6th of October they went out of possession, leaving the chattels in the hands of the liquidator.

In November, 1877, parts of the loose material and plant on the premises were sold, without prejudice to any question, and the proceeds, amounting to £4,533 17s. 1d., were paid into Messrs. Backhouse's bank to a separate account.

On the 17th of May, 1878, the solicitors of the bank gave notice to the liquidator that the bank would, after the 22d of that month, appropriate the £4,533 17s. 1d. in their hands towards payment of their claim, which was admitted to exceed £20,000.

On the 22d of May Mr. Fleming, who had obtained leave 340] to attend proceedings, as representing the unsecured creditors, gave notice to the liquidator that he claimed, on behalf of the unsecured creditors, all effects on the property which were not fixtures passing by the mortgage deed.

The liquidator, having no assets in hand, hesitated about taking any proceedings, but ultimately, by the direction of the judge in chambers, he took out a summons, which was served on the bank and Fleming, to show cause why the sum of £4,533 17s. 1d. should not be paid to the liquidator, and also to show cause why the undisposed of portion of the movable plant and fixtures should not be forthwith sold by the liquidator for the benefit of the creditors.

The only question of fact in dispute, except a question as to what Bradley said to Lloyd and Ramsey when he put them in possession, was as to the value of the ironworks at the date of the mortgage. Five witnesses on behalf of the bankers said that in 1875 £5,000 was "a fair rent" for the property. Four witnesses on behalf of Mr. Fleming deposed that, owing to the depreciation in that kind of business which had been going on since 1874, they believed there would have been, in 1875, great difficulty in letting the premises for £2,500 a year.

The summons came on for hearing before Vice-Chancellor Bacon on the 5th of December, 1878.

Phear and Cree, for the official liquidator.

Hemming, Q.C., and *Romer*, for Fleming: Supposing this had been a bankruptcy instead of a winding-up, the seizure under this so-called distress could not have stood:

Ex parte Williams ('). In the words of Lord Justice James ('), it would have been "an attempt to defeat the operation of the bankruptcy laws, which cannot succeed."

Then comes the question whether this is a rule of bankruptcy which is to prevail in the winding-up of a company under the 10th section of the Judicature Act, 1875 (38 & 39 Vict. c. 77). We say it is such a rule.

The decision of the Master of the Rolls in *In re Printing and *Numerical Registering Company* (') has an im- [34] portant bearing. By deciding that the bankruptcy rule, whereby an execution creditor for more than £50 loses the benefit of his judgment if the sheriff gets notice of bankruptcy within fourteen days after a sale, is to prevail and be observed in a winding-up, his Lordship really extended the application of the 10th section beyond what is asked for here, for he applied it not only to import a section of the bankruptcy act, but to give relief analogous to but not covered by the terms of that section. The real question is, whether the generality of the words of the 10th section, which cover all questions as to the respective rights of secured and unsecured creditors, has been restricted by decision. Mr. Fleming is an unsecured creditor, whereas the bank are secured creditors, and therefore we are within the general words of the 10th section.

At first the decisions on the 10th section of the act of 1873 were narrow: *In re Albion Steel and Wire Company* ('), and the authorities there referred to. But the decision of *In re Printing and Numerical Registering Company* shows a wider construction, and is authority for saying that on any question between secured and unsecured creditors the rights in a winding-up are the same as in bankruptcy.

Then was the distress a legal distress? Mr. Bradley is instructed by the company's solicitors; he is accompanied on his errand by the company's managing director; he selects two of the company's men, paid by the company, tells them they are to hold possession, without (as we say) saying for whom, and he gives them a sealed envelope which they do not open. Can there be a doubt that the object of the transaction was to make things as pleasant as possible; to attempt to make the thing a substantial transaction if the company really became insolvent, and to render it a nullity if not?

Our evidence is that the rent was excessive, as it plainly

(') 7 Ch. D., 138; 23 Eng. Rep., 469.

(2) 7 Ch. D., 148.

(3) 8 Ch. D., 535; 25 Eng. Rep., 459.

(4) 7 Ch. D., 547, 550.

was in *Ex parte Williams* (1), and the consequences there pointed out must follow.

The object of inserting the clause is plain ; if the winding-up order should be made, it was to operate ; if not, it was to have no application. In other words, the object was to 342] evade publicity, *and defeat the provisions of the Bills of Sale Act: *Ex parte Hooman* (2); *Ex parte Jay* (3).

[BACON, V.C.: I do not think the liquidator is one of the persons against whom the Bills of Sale Act takes effect: *In re Marine Mansions Company* (4).]

That was before the Judicature Act had imported the bankruptcy law into winding-up proceedings.

An attornment clause does not enable the mortgagee to repay himself any of the capital advanced, *Hampson v. Fellows* (5); and a distress by a creditor against a company in liquidation under supervision is void: *In re Traders' North Staffordshire Carrying Company* (6). The last-mentioned authority applies, because the mortgagees here would come and ask the court for leave to perfect the distress. They are not in the simple position of outside creditors.

Sir H. Jackson, Q.C., and B. B. Rogers, for Messrs. Backhouse, the mortgagees: This deed is not a bill of sale, and the official liquidator is not in the position of a trustee in bankruptcy. The only question between us is one of value—of the amount of rent. The clause is in the most ordinary form to be found in all the collections of conveyancing precedents. The distress was perfectly regular, and the sale was not a sale under an execution, but under a distress.

The Master of the Rolls in *In re Printing and Numerical Registering Company* (7) certainly departed from his previous view as to the extent of range of the 10th section of the Judicature Act, 1875. An *obiter dictum* in *In re Printing and Numerical Registering Company* cannot disturb the former judgment.

It is sufficient, in order to distinguish this case from *Ex parte Williams* (1), that this is an ordinary deed in common form, and that here the rent is fair and moderate.

We do not want the aid of the bankrupt law, but if we 343] were in *bankruptcy, the 34th section of the act of 1869 would give us one year's rent: *Ex parte Hill* (8).

(1) 7 Ch. D., 138; 23 Eng. Rep., 469.

(2) Law Rep., 10 Eq., 63.

(3) Law Rep., 9 Ch., 697.

(4) Law Rep., 4 Eq., 601, 610.

(5) Law Rep., 6 Eq., 575.

(6) Law Rep., 19 Eq., 60; 11 Eng. R., 672.

(7) 8 Ch. D., 535; 25 Eng. Rep., 459.

(8) 6 Ch. D., 63; 22 Eng. Rep., 640.

Hampson v. Fellows (*) was decided on demurrer under very special circumstances.

Morton v. Woods (†) is a direct authority that “a mortgage including chattels, with a power ultimately to take possession or distrain,” is not a bill of sale within the act. Kelly, C.B., observes that “no such doctrine can be supported.”

Hemming, in reply.

BACON, V.C., after some preliminary observations, continued: The law stands plainly upon the Judicature Act of 1875. [His Lordship read the 10th section, and continued:]

What does that mean? It means that, when a winding-up shall happen, the estate to be administered—for that is the thing in which secured and unsecured creditors are interested—shall be dealt with according to the law of bankruptcy.

The summons before me presents this proposition: When the winding-up order was made, or rather when the petition was presented—for that is the time at which the liquidator's title begins—there was a distress for rent, but nothing was done upon that distress after the expiration of the five days, from and after which it might have been realized by sale. Nothing was done, and nothing has been done since, except what has been done by mutual consent, so as not to alter the rights of the parties. I have to deal with the rights of the creditors, unsecured and secured, as they were on the day when the petition was presented. At that time this distress had been levied, on the authority of a deed which in one respect is an ordinary mortgage deed, but which contains in it also the attornment clause that, in default of due payment of the interest, the mortgagees shall have a right, founded upon the attornment which the mortgagors make to them, to distrain for rent. That is to say, having security upon all the immovable property, which would include the fixtures, they are to have the right to distrain upon the movable chattels for *the sum mentioned in the at- [344] tortment clause, to the amount of £5,000 a year.

I do not think it is of any importance, or that I need dwell upon the question which has been raised, whether that was a fair rent or not. From the description which has been given to me in evidence, I should doubt whether there was anything unfair in the stipulation of £5,000 a year as the rent of these premises. But when I look at the deed, I ask myself, To what end could this proviso have been inserted in a mortgage deed, unless it was to avoid the provisions of the Bills of Sale Act, and to provide for the

(*) Law Rep., 6 Eq., 575.

(†) Law Rep., 4 Q. B., 293, 307.

mortgagees a remedy which, when insolvency happened, they could put in force?

In *Ex parte Williams* (') the thing was a little more patent, because there, by the covenant of the mortgagees, they engaged that they would leave the mortgagor in quiet possession unless bankruptcy should happen, and then followed a most innocent and unobjectionable attornment clause. The Lords Justices, upon considering that deed, were satisfied that the original purpose was to give to the mortgagees a security equivalent to that which a bill of sale would have given them if it had been registered, and that it was given to provide against the accident of bankruptcy. If I am asked to consider this deed, and to consider the relations between the bankers and this company, I cannot doubt that that was the real intention of the parties here—not fraudulent except in the sense in which that word is applied to transactions which come to be overhauled in bankruptcy—but that it was the very object and intention of the parties that while the interest was duly paid, the bankers should be content to take their interest, and that if that failed to be paid, then that they should have power to take the chattels not assigned to them, under the power of distress, and so pay themselves at the rate of £5,000 a year. I do not think it signifies very much whether £5,000 a year was the amount of the interest, or whether it exceeded that amount greatly; because if the stipulation is entered into between the parties they are to be bound by it. If that is against the law of debtor and creditor, then it is invalid. The Lords Justices, in the case which has been 345] referred to, came to the conclusion that *the intention of the parties there, as shown by the attornment clause, was, that the mortgagee should have a remedy available in case of bankruptcy. In my opinion a similar conclusion ought to be drawn from the deed in this case, and I think the only intent and meaning of it was, that if bankruptcy or insolvency should happen, the mortgagees should have a remedy which would give them a preference over the other creditors. So much for the deed.

There is, moreover, to be considered this, that at the time when the title of the liquidator arose, the 10th section of the act which I have read was of course operative, and the law then was, that as between secured and unsecured creditors the law of bankruptcy should prevail. The bankers were secured creditors; the rest of the creditors are unsecured. The estate is to be administered among them ac-

(') 7 Ch. D., 188; 28 Eng. Rep., 469.

ording to their respective rights. A broker comes and says, "I have come here to distrain," and a managing director says, "Well, I am very sorry to see you, but I cannot help it." "Find me two trustworthy men," says the broker, and two men are brought out, and he gives these men directions to remain in possession of the property, and they obey his directions, and night and day keep watch over it. That is all they do. What he says in his affidavit comes virtually to this: "I told them, if anybody asked them what they were there for, to say they were there on my authority, and to refer him to me," and so the possession, as it is called, is taken. If this were a bankruptcy, is that a possession that the person taking it can maintain any right to? From that day down to some other later day, no matter when, the business of the company was carried on as usual, the workmen were employed as usual, no visible change took place in the possession by the company of the chattels which it is said had been distrained upon, and in the actual visible possession of the company they had remained with the full consent of the bankers. If the law in bankruptcy is to be applied, this is clearly and plainly a possession by the true owners, if the bankers are the true owners, with the full consent of the company. Until the winding-up order is made, or until a petition is presented, that would be enough to dispose of the case, in my opinion. The bankers could not sell for five days; they did not attempt to sell. The broker who had formally taken possession, as he says, exercised no right of *ownership, excluded nobody, stopped no business, [346 assumed no character of owner, but in a conversation between himself and the managing director said, "I give you notice that I am here in possession, and these men shall keep possession for me."

The case of *In re Printing, &c., Company* (') is a valuable case, because it contains an exposition of the law by the Master of the Rolls which, in my opinion, ought to be followed. The Master of the Rolls, after referring to the act of Parliament, says ('): "The respective rights of the secured and unsecured creditors of a company in liquidation are the same as under the law of bankruptcy." If that is so, the case of reputed ownership is plainly made out, and there is no dispute about it. "The first question," the Master of the Rolls says, "I have to consider is, are the creditors in question secured or unsecured? They are certainly secured in a sense, by having taken the property of the company, the debtor, in

(') 8 Ch. D., 535; 25 Eng. Rep., 459.

(') 8 Ch. D., 538.

execution."—A distress, in my opinion, is not more potent than an execution.—"Under that execution they were entitled to sell the property and pay themselves out of the proceeds; they are secured in that way; they are not secured under contract. Persons holding security, whether under an execution or a garnishee order, or by judgment on tort, or by contract before judicial interposition, are secured creditors." But I have not heard it denied that the bankers in this case were secured creditors. "Then," the Master of the Rolls continues, "if the applicants in this case are secured creditors, what are their rights? Their rights are to be determined by the law of bankruptcy;" and the 87th section of the act provides for the case where there has been a seizure and a bankruptcy within fourteen days, and where the proceeds are held by the sheriff for the trustee in bankruptcy. The Master of the Rolls says: "That section, therefore, defines the right of an execution creditor in bankruptcy. Now the 10th section of the Judicature Act, 1875, says that in the winding-up of a company the same rules shall prevail and be observed as to the respective rights of secured and unsecured creditors . . . as may be in force for the time being under the law of bankruptcy with respect to the estates of persons adjudged bankrupt." I can hardly 347] conceive any words in which *the meaning could be more distinctly expressed, or an enactment more plain and positive. "One of such rules," the Master of the Rolls says, "is, as I have shown, that an execution creditor is not to have the benefit of his execution if within fourteen days after the sale of the debtor's property the sheriff has notice of bankruptcy. I must therefore apply that rule to the present case, and hold that even if the sheriff had actually sold the property of the company, the execution creditors could have had no right to pay themselves out of the proceeds, but the whole of the proceeds must have been handed over to the liquidator for the general benefit of the creditors."

In my opinion the law so expressed by the Master of the Rolls is the law which governs this and all like cases of a secured creditor, whose security is not perfected and completed by sale or by some other act, and for that reason the court takes possession of the whole of the estate of the insolvent company, and no step can be taken by the secured creditor to complete his security but with the sanction of the court.

Now let me suppose there was an application before me on behalf of the secured creditor that he might complete

his security by the receipt of the proceeds of the sale of this property—the court being reminded that there was no law to administer but the law of bankruptcy. The law of reputed ownership is a part of the law in bankruptcy; the reputed ownership clearly was in this company up to the time when its insolvency commenced, and the rights being the same as they would be in bankruptcy, the bankers who exercised their power to distrain and who made this very imperfect distress can have no right to complete their distress at the expense of the unsecured creditors.

I am of opinion, therefore, that the liquidator's summons ought to be acceded to, and that as to the sum of £4,533 17s. which is *in medio*, he is entitled to receive that sum, and he is entitled to receive and possess and realize under the liquidation all the other chattels which were seized under this distress.

There will be an order accordingly; the costs of all parties to come out of the estate.

On the 9th of January Messrs. Backhouse & Co. gave notice *that the Court of Appeal would be moved on [348 the 15th inst., or so soon after as counsel could be heard, that the order of the 5th of December might be discharged, and the application of the liquidator dismissed with costs. The appeal came on among the appeals from interlocutory orders on the 22d of January, 1879.

Sir H. Jackson, Q.C., Horton Smith, Q.C., and B. B. Rogers, for the appellants.

Hemming, Q.C., took a preliminary objection: By Order LVIII, rule 4, notice of appeal from any judgment, whether final or interlocutory, is to be a fourteen days' notice, and notice of appeal from an interlocutory order is to be a four days' notice. By rule 9 the time for appealing from an order in a winding-up is to be the same as for an appeal from an interlocutory order. This rule treats such orders as not being interlocutory, and though the time for appealing is the same as if they were so, they must for all other purposes be treated as final orders when they are such in their nature: *In re National Funds Assurance Company* ('). The notice, therefore, ought to have been a fourteen days' notice, and is invalid.

[JESSEL, M.R.: The Court of Appeal, under Order LVIII, rule 3, has power to amend it.]

Where a respondent has gained an advantage by the ap-

(') 4 Ch. D., 305.

pellant's non-compliance with the rules, the Court of Appeal does not relieve the appellant except on special grounds, and it is necessary that the respondent should have acted so as to raise an equity against him: *Rhodes v. Jenkins* (*).

[JESSEL, M.R.: That turned upon Order LVIII, rule 15, where "special leave" is required, which has been held to mean "leave granted on the ground of special circumstances." The same principle does not apply to an application for leave to amend under rule 3, which says nothing about special leave.]

The rules say nothing about special circumstances; and "special leave" appears properly to mean leave granted on 349] any particular *occasion, having regard to the circumstances of the particular case as distinguished from leave granted by general orders in all cases of a particular class.

Sir H. Jackson, Q.C., contra, was not called upon.

JESSEL, M.R.: The argument we have heard amounts to this, that where a simple slip has been made in the form of a notice of appeal we are not to allow it to be amended. If this be so, the only case in which the power given by Order LVIII, rule 3, can be exercised, is where a mistake has been made on purpose, which is absurd. Assuming the notice already given to be insufficient, leave to amend must be given, but of course the respondent is entitled to insist that the appeal shall not be heard till the expiration of the proper notice.

BAGGALLAY and BRAMWELL, L.JJ., concurred.

Sir H. Jackson: It would be convenient if the Court of Appeal would decide whether a fourteen days' notice was requisite. The practice has been to treat such appeals as requiring only a four days' notice, but the rules do not appear to be clear. Order LVIII, rule 4, which defines the notice, deals with "judgments" and "interlocutory orders." This does not seem to be an interlocutory order (*); it is questionable whether it is a judgment.

[JESSEL, M.R.: Order XLII, rule 20, tends to show that it is not.]

Order XLI, rule 1, points to the conclusion that judgment means only judgment in an action.

JESSEL, M.R.: There is some difficulty in the rules which makes a slip very excusable. The rules appear to contemplate two classes of orders: final orders which determine 350] the rights of parties, and orders which *do not determine the rights. We are of opinion that the order now

(*) 7 Ch. D., 711.

(*) See 1 Ch. D., 41.

under appeal belongs to the former class, and that a fourteen days' notice was necessary.

Jan. 29. *Sir H. Jackson, Q.C., Horton Smith, Q.C., and B. B. Rogers*, for the appellants: The Vice-Chancellor decided this case mainly on the authority of *Ex parte Williams* (¹), which we submit is wholly inapplicable. That case followed *Ex parte Mackay* (²), and went on the ground that the security was an attempt to oust the law of bankruptcy by a contract between the parties. The Vice-Chancellor seems to have argued from the event to the contract, and to have held that because the security was sought to be enforced after what the court held tantamount to a bankruptcy, it was a security intended to take effect only in the case of bankruptcy, and the rent named was so excessive that it showed the transaction to be a sham. But the rent, to say the least, is not outrageous. Then the Vice-Chancellor treated this as a bill of sale, and considered us to be taking an insufficient possession under an unregistered bill of sale. But this was not a bill of sale. It is true that now under the Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), s. 6, an attornment may be treated as a bill of sale, but that very enactment shows that it was not so before. Then as to the effect of the Supreme Court of Judicature Act, 1875 (38 & 39 Vict. c. 77), s. 10, if that section puts us on the same footing as if there was a bankruptcy, a proposition which we do not care to contest, we are protected by the Bankrupt Act, 1869 (32 & 33 Vict. c. 73), s. 34, as the value of the chattels is less than one year's rent. Though the mortgagees here are not, in the popular sense, landlords, they are so within the meaning of the act: *Ex parte Hill* (³). A landlord distraining need not sell at once, he may sit upon his security: *Lehain v. Philpott* (⁴). The doctrine of reputed ownership is out of the case, for a distress does not alter the property in the goods till a sale takes place.

**Hemming, Q.C., and Romer*, contra: It is con- [351] ceded that in this case the rules in bankruptcy apply. How would this attornment clause have stood in bankruptcy? Such a clause is not uncommon where a mortgagor is in occupation, but the practice is to confine the rent to the amount of interest.

[JESSEL, M.R.: If there is an ascertained principal, that is so, but if the interest was reducible on punctual payment, the rent would be equal to the larger amount of interest.

(¹) 7 Ch. D., 138; 23 Eng. R., 469.

(²) Law Rep., 8 Ch., 648.

(³) 6 Ch. D., 68; 23 Eng. R., 640.

(⁴) Law Rep., 10 Ex., 242; 13 Eng. R., 371.

In a banker's mortgage there is no ascertained interest, and the rent cannot be thus fixed, and in this case the interest is left in blank in the deed.]

The interest could not be on a larger sum than £50,000, so the rent reserved is out of all proportion to the interest.

[JAMES, L.J.: Suppose a man lends £1,000 on mortgage of a house worth £500 a year, which is in the mortgagor's occupation, and the mortgagor attorns at £500 a year, why should not this be valid, and why should not the rent go in reduction of the principal?]

The evidence shows that £5,000 is extravagantly beyond the value, which brings the case within the principle of *Ex parte Williams* ⁽¹⁾. Moreover, we contend that an attornment clause does not create the relation of landlord and tenant as regards third parties. If I attorn tenant to a person who has no legal estate, and here the mortgagees had none, I am estopped, but there is no legal tenancy as regards third parties.

[JESSEL, M.R.: This is not properly an attornment, it is the creation of a tenancy.]

But the persons professing to let had no legal estate.

[JAMES, L.J.: Do you mean to contend that a person who lets land has not all the rights of a landlord although the legal estate is outstanding?]

I do not dispute that he has as against the tenant by estoppel where the intention is to create the relation of landlord and tenant; but here there is no such intention, the 352] only object being *to give a security. Can a person in such circumstances create a power of distress so as to enable the so-called landlord to seize the goods of third persons merely by calling a sum rent when it is not rent, i.e., a sum paid periodically for the use of land? Suppose a warehousman grants a mortgage, can he by an attornment clause enable the mortgagee to seize goods of third parties on the premises to any amount by naming a large sum as rent?

[JESSEL, M.R.: There may be a rent so large that the reservation of it must be pronounced a sham.]

We say that this rent is so.

[JAMES, L.J.: You must show that it was rent which both parties knew to be outrageous.]

We submit that the right of distress does not arise unless there is a *bona fide* relation of landlord and tenant created, i.e., possession given to the tenant by the landlord, and rent reserved as an equivalent for it.

(1) 7 Ch. D., 138; 23 Eng. Rep., 469.

[JAMES, L.J.: Do you carry it so far as this, that every attornment clause is void as against the trustee in bankruptcy?]

Yes; we contend that sect. 34 does not apply to the *quasi* tenancy created by an attornment clause. No authority for so applying it can be found. The effect of such a clause is to give security. The purpose is to get security; and where both effect and purpose point to security, it is a mere sham to give it the form of a remedy for rent, which it is not except in form, for it is not meant as payment for the use of land. It is practically a security to take effect in case of a bankruptcy. The court cannot shut its eyes to the fact that this was a device to get a security on the chattels.

Then we say that this is a bill of sale. The Bills of Sale Act, 1854 (17 & 18 Vict. c. 36), expressly includes authorities to take possession of chattels, and this is such an authority.

[BRAMWELL, L.J.: At that rate every lease is a bill of sale of chattels.]

In the case of a lease there is only the effect of enabling the lessor to seize them; here there is the purpose as well as the effect.

*[JAMES, L.J.: Would not a subsequent incumbrancer be entitled to treat a first mortgagee under a clause of this nature as a mortgagee in possession as to the rent thereby reserved, and charge him with it as rent which but for his wilful neglect or default he might have received?]

JESSEL, M.R.: Probably the fear of this is the reason why the rent generally is made only equal to the interest.]

I should have thought he would not be mortgagee in possession.

Then we say that the seizure was not *bona fide*; it was a mere arrangement between the mortgagors and mortgagees.

[In answer to a question from the court, Sir H. Jackson said that the mortgagees waived all claim to the unsold chattels, adding that they considered them to be practically worthless.]

JESSEL, M.R.: This is an appeal from a decision of Vice-Chancellor Bacon, and the question to be decided is whether the appellants are or are not entitled to a sum of about £4,553, the proceeds of the sale of certain chattels which belonged to the company called the Stockton Iron Furnace Company, Limited, now in liquidation, and which have been sold by arrangement since the commencement of the liquidation, without prejudice to the rights of the parties.

The title of the appellants was founded on a deed dated

in 1875, by which they, being bankers, took what I may describe as an ordinary banker's mortgage from the company, the mortgage comprising the property of the company, which was copyhold, on which they carried on their works. This mortgage was given to secure the ordinary banker's balance to an amount not exceeding £50,000, and it contains this clause:—[His Lordship read the attornment clause.] Under that clause the appellants say that the company became their tenants from year to year at a rent of £5,000, and they put in a distress nominally for two years' rent, but inasmuch as the value of the property in question does not amount to one year's rent the appellants have agreed to limit their claim to the sum of cash in dispute, £4,553 17s. 1d.

The first question to be considered is whether there was 354] any *tenancy at all, or, as it has been put in the argument for the respondents, any *bona fide* tenancy. Now it appears to me that there was. In the first place, we must remember that according to the course of practice of conveyancers, when the mortgagor is occupying, so that there is no rent receivable to meet the interest on the mortgage debt, it is usual that he should agree to become tenant. There is nothing novel or remarkable in the mortgage. It is in the ordinary form. But then it was said that the rent was so excessive, and so very much above the annual value of the property, that it never could have been intended that an actual tenancy should be created. In the first place, I am not satisfied that the rent was excessive. The evidence stands in this way: five valuers say that the property was quite worth £5,000 a year; four valuers say that it was not worth more than half that sum; but when we consider the nature of the property, and, I may add, the nature of the valuers, it becomes impossible to say that there was any excess, or any large excess. You cannot let these properties to everybody. They are not ordinary properties as to which valuers can really give an opinion which would be accepted by other persons; what is the proper rent must be to a great extent a mere matter of individual opinion, and upon this evidence I am by no means satisfied that the rent was in fact excessive, and certainly it is not shown to me to be so excessive as to prove that there was any intention on the part of the two parties to this mortgage that it should not be a real rent but a fictitious rent. Then it was said that the object of the mortgagors becoming tenants was repugnant to the bankruptcy law, for that the object was to enable the mortgagees, in case of bankruptcy, to distrain for the rent in arrear, and in that way obtain a preference.

As regards one year's rent, which is all we are now considering, the 34th section of the Bankruptcy Act, 1869, gives the landlord that preference, and therefore there is nothing in the law of bankruptcy to prevent his obtaining the benefit of it if he is a real landlord, and he is not the less a real landlord because he is mortgagee. It was part of the bargain that he should become landlord, and no doubt the rent he receives is a security in the event of a bankruptcy, but so is the rent of the mortgaged property *in that event [355 whether the rent is to be paid by the mortgagor or by third persons. It does not appear to me that there is anything in this case to enable us to apply the doctrine laid down by the Court of Appeal in *Ex parte Williams* (1), to which, so far as I can properly express, I do express my assent. There is only one other objection remaining to be considered, and that is whether or not there was a distress. It is said that because the man who put in the distress went to two of the workmen and told them to keep possession for him, therefore it is not to be looked upon as a real distress. But I think that is a mistake. No doubt the bankers only meant to make themselves safe. They did not wish to prevent the company from going on if it could go on, so long as they were safe, and they did not wish that the public should know too much about the distress as long as there was a chance of the company going on. The fact is that a petition to wind up was presented within three days after they made the distress. What they did, therefore, was really only for the purpose of exercising their right of distress, which is a right incident to their position of landlords, and their object and meaning, and the object and meaning of the company by their manager, who acceded to the arrangement by which the workmen kept possession on behalf of the broker, was that there should be a distress to make the bankers safe whatever should happen to the company. It appears to me that the distress was perfectly *bona fide*, that the sole object of the parties was a *bona fide* distress, and that therefore there is no objection upon that ground. There were other arguments brought forward on behalf of the respondents, but they were not the grounds of the judgment in the court below, and I do not see that they have any application to the case before the court. I may mention particularly the arguments on the Bills of Sale Act. This is not a bill of sale as I understand the former Bills of Sale Act, which was the only one then in force; it is not a license or authority to take possession of chattels within

(1) 7 Ch. D., 188; 23 Eng. Rep., 469.

that act, and it is therefore not necessary to consider whether the Judicature Act, 1875, s. 10, would extend so as to bring into operation the Bills of Sale Act and make it applicable to the cases of winding-up.

On the whole, it appears to me that the appellants are 356] right in *their contention, and that an order in their favor ought to be made with costs.

JAMES, L.J.: I am of the same opinion. As to the case of *Ex parte Williams* ⁽¹⁾ which has been called to our attention, I entirely reaffirm, if it were necessary to reaffirm, everything that was there said. If the rent had, as in that case, been of such an absurd amount that it could never have been intended to have been a rent, but must have been intended as part of a device to enable the mortgagee to get something in bankruptcy which he would not otherwise get, the principle of that case would have been applicable. But I am by no means satisfied that there was anything unreasonable in the rent which was reserved. No doubt, as was pointed out to us by the counsel for the respondents, we cannot shut our eyes to this, that the bankers probably did mean by this clause to get a security upon the chattels which otherwise they would not have had, but they got that security on the chattels by means which are not prohibited by law—they got it by means of an arrangement that they should be landlords, and that arrangement, in the then state of the law, carried with it the incidents of distress. They were doing it by an arrangement which gave them the rights, and only the rights, of landlords, and made them subject to all the liabilities of mortgagees in possession. An actual lease being created with a reservation of rent, the bankers were as much mortgagees in possession, for all purposes of taking the account of what was due on the mortgage, as if they had granted the lease to some new lessee and had given notice to that lessee to pay the rent to them. They were mortgagees in possession liable to account in respect of this £5,000 a year as against any second mortgagee or incumbrancer for what they had received or, but for their wilful default, might have received. Their rights as landlords are very different from the rights they would have had under a bill of sale, for a bill of sale would have given them the right to seize the chattels for the whole amount of their debt, both principal and interest. Under the bankruptcy law, or under the winding-up law, which may be taken together, all they 357] get is *one year's rent. They were incurring liabilities as mortgagees in possession, and they have a limited

(1) 7 Ch. D., 188; 23 Eng. Rep., 469.

right as landlords. It appears to me that such a tenancy has all the incidents of a tenancy both as regards the parties themselves and a third person whose goods happen to be on the property. That being so, there is nothing which was in violation of any rule of law, or anything that could be said to be in fraud of the bankruptcy law. I quite agree with the Master of the Rolls that the order of the court below ought to be reversed with costs, and the costs of the appeal will also be given to the appellants.

BRAMWELL, L. J.: I am of the same opinion. I have no doubt that this deed in every part of it was, as it is expressly declared to be, "a security for the balance for the time being on the account current of the said company." I have no doubt that this deed in every clause of it was so intended, and I have no doubt that whatever money was received under the distress that has been made must go in part payment of the debt which would otherwise be payable from the mortgagors to the mortgagees. I have no doubt also that the object of this clause of tenancy must have been to enable the mortgagees to avail themselves of the chattels of the company under a distress for rent. The observation to be made upon it is this—they had a right so to arrange. They might have had the goods or the property conveyed to them with the power of seizing future goods, but that would have been a bill of sale requiring registration. Instead of taking such a security, they took a clause of tenancy, the effect of which was to enable them to distrain for the rent. The law does not forbid their entering into such an arrangement, taking all the beneficial and all the inconvenient consequences arising from it. One of the consequences would be this—to give a second mortgagee a right to charge them with the rent they might have received. Another consequence of it is this, to which attention has not yet been called: it is true that they have a power to enter and resume possession, or take possession, and so to determine the tenancy from year to year, but not until after the 23d of August, so that for six months under this agreement for tenancy, whether the premises were surrendered as *covenanted or not, the mortgagors would have a [358 right to the possession of this land as against the mortgagees, and they could have possession under no other title than as tenants, because but for this clause the rights of possession would have been in the mortgagees. There are various differences between the two kinds of security. If they had taken the security in the shape of a present grant of chattels on the premises, with a right to seize subsequent

chattels, there would have been no right on the part of the mortgagors to dispose of any of the chattels which they had so granted, since they would have belonged to the mortgagees; but under the actual arrangement, until a distress was made, all the chattels on the premises might have been sold by the mortgagors, or taken in execution by the sheriff, and upon being removed from the premises would have been free from any claim for rent. The law allows them to take the security in the form in which they did take it, with all its consequences.

Then, with reference to the case of *Ex parte Williams* (¹), I think it is very likely, indeed I have no doubt, that the parties here did not contemplate that the \$5,000 a year would be paid if things went on prosperously and fortunately. In all probability nothing would have been paid except the interest. But they did not intend that it should never be paid. There was no agreement between the parties inconsistent with the arrangement expressed in this deed, although there was an understanding upon the part of both parties that it would not be put into operation while the affairs of the company went on prosperously. To my mind, the difference between this case and *Ex parte Williams* is this, that in *Ex parte Williams* it was found, and, if I may add my concurrence to that case, it was rightly found, that the intention and object of the arrangement there was to commit what was called a fraud upon the bankruptcy law, by entering into stipulations which were not to be enforced except in the event of bankruptcy. Here, although no doubt the parties did not contemplate the mortgagees putting their right to the rent into operation, yet if there had been no liquidation the bankers would have made the distress which they have made, if for any other reason they had thought that their balance was ill-secured.

359] *An order was made discharging the order under appeal, so far as it ordered the payment of the money to the liquidator, and ordering the £4,533 to be paid to the bankers, that part of the order which related to the unsold goods remaining unaltered.

Solicitors: *Kearsey, Son & Hawes*; *R. T. Jarvis*; *Cree & Son*.

(¹) 7 Ch. D., 138; 23 Eng. Rep., 469.

[10 Chancery Division, 859.]

C.A., Jan. 15, 1879.

HUGGONS V. TWEED.

[1878 H. 182.]

Counter-claim—Rules of Court, 1875, Order xix, r. 3; Order xxii, r. 9.

The executors of M., a holder of debentures of a company to the amount of £2,000, commenced an action to have the trusts of a deed for securing payment of the debentures of the company carried into execution. The company delivered a defence and counter-claim. By the defence they alleged that an amount exceeding £2,000 was, under the circumstances mentioned in the counter-claim, due from M. to the company, and claimed a set-off. By the counter-claim they alleged that M. had been a director and promoter of the company, and while filling those characters had joined with other persons in selling an estate to the company at a profit, concealing the fact of his interest in the estate, and that he had received more than £2,000 as his share of the profit of the transaction. The counter-claim asked that the executors might be ordered to pay to the company the share of profit which M. had received, and also the remainder of the profit which, in breach of his duty as a director, he had allowed to be received by the other vendors. The plaintiffs applied to have the counter-claim excluded on the ground that it could not be conveniently disposed of in the present action, and ought to be tried in an independent proceeding. The application having been refused by Hall, V.C., the plaintiffs appealed:

Held, that although, taking Order xix, rule 3, and Order xxii, rule 9, together, the question whether a counter-claim shall be excluded is not so entirely in the discretion of the judge of first instance as to preclude an appeal, he has a discretion which will not be interfered with by the Court of Appeal except in a very strong case, and that in the present case this discretion had been rightly exercised.

[10 Chancery Division, 865.]

C.A., Jan. 24-27, 1879.

In re FORD AND HILL.*[365]**

[1878 F. 10.]

Vendor and Purchaser—Inquiry as to Incumbrances.

A purchaser made the following requisition, "Is there to the knowledge of the vendors or their solicitors any settlement, deed, fact, omission, or any incumbrance affecting the property not disclosed by the abstract?"

Held, by Hall, V.C., on an application under the Vendor and Purchaser Act, 1874, that the vendor's solicitors must make a complete answer to the requisition and order made on them accordingly.

Held, on appeal, that neither the vendors nor their solicitors were bound to answer any part of the requisition.

THIS was an appeal from an order of Vice-Chancellor Hall, under the Vendor and Purchaser Act, 1874.

Ford and Harford, who were trustees for sale, having contracted with Hill for the sale to him of certain freehold

property, the purchaser sent in requisitions, among which was the following:—

"8. Is there to the knowledge of the vendors or their solicitors any settlement, deed, fact, omission, or any incumbrance affecting the property not disclosed by the abstract?"

The reply was, "We invariably decline to answer questions of this description." The requisition being pressed, the reply was returned, "The vendors will reply if required, but they have no knowledge of the contents of the abstract."

A summons was taken out under the Vendor and Purchaser Act *by the purchaser for an order on the vendors and their solicitors to answer this inquiry. The case was heard by Vice-Chancellor Hall in chambers. His Lordship adhered to his decision in *In re Solomon and Davey* (1), and made an order "that R. L. G. Vassall, T.

(1) March, 1875.

In re SOLOMON AND DAVEY.

HALL, V.C.: This is a summons under the 9th section of the 37 & 38 Vict. c. 78, intituled "An act to amend the law of vendor and purchaser, and further to simplify title to land." The property the subject of the contract is a freehold dwelling house and shop in Thomas Street, in the city of Bristol. The purchaser sent to the vendor's solicitor requisitions on title, the third requisition being this, "Whether the vendor is or his solicitors are aware of any judgments, settlements, mortgages, charges, or incumbrances of any description affecting the property not disclosed by the abstract of the vendor's title." The vendor's solicitor declines to answer the requisition. I am of opinion that the requisition must be answered. It has been the practice of conveyancers ever since I commenced practice to make a requisition somewhat similar to the one in question. Sometimes it has been less specific, i.e., not mentioning settlements or mortgages. The requisition has generally been answered. But for a long time past some solicitors have objected to answer it, their reason being that answering it might subject them personally to legal liability to the purchaser, although they were not morally guilty. Upon such objection being made the requisition has sometimes not been insisted

on, but this has generally been done to avoid delay and possible litigation. Some counsel have always insisted on the requisition being answered, and I believe their doing so has almost always obtained an answer. The ground of objection to answering this requisition is, I consider, insufficient. Some solicitors answer the requisition in this manner. "Not that we are aware, but the purchaser's solicitor should make the usual searches." Such form of answer, I consider, gets rid of the objection. The requisition is one which causes the vendor's solicitor to consider whether the property sold is not affected by something which it had not occurred to him did affect it, such as a charge under some drainage or local act, and it is the fact that purchasers have been thus frequently protected against defects of title which had been overlooked by the vendor's solicitor. The requisition in the present case goes to the solicitor's knowledge and also to that of his client. This involves inquiry by the solicitor from his client. I think it not unreasonable so to frame the requisition. To answer it the solicitor must communicate with his client. There may be cases in which, by reason of the client's absence or under other circumstances, a purchaser may be compellable to complete his purchase without the answer to his requisition extending to the client's knowledge, but I think these are exceptional cases. In what

*Parr, and J. Osborne, of the city of Bristol, practising under the style of Osborne, Ward, Vassall & Co., the solicitors of the said J. Ford and W. H. Harford, do make a full, sufficient, and complete answer to the eighth requisition as to the title of the said James Ford and W. H. Harford made upon and arising out of the abstract of such title delivered by the said J. Ford and W. H. Harford to the said C. Hill, and that a list of the incumbrances appearing in such abstract be made and shown to the said J. Ford and W. H. Harford, and that the said J. Ford and W. H. Harford do answer the said requisition as to their knowledge of any settlement, deed, fact, omission, or any incumbrance affecting the property sold not appearing in such list," and that Ford and Harford should pay Hill his costs of the application. [367]

The vendors appealed from this order. The appeal came on to be heard on the 24th of January, 1879.

Everitt, for the appellants: There is no reported case in which a vendor or his solicitor has been held bound to answer such a requisition. The practice of making such an inquiry appears from Dart's Vendors and Purchasers⁽¹⁾, and Mr. Christie's evidence there referred to, to be a recent one, and it is an unreasonable practice. The court has no jurisdiction to order the solicitor to answer it, and if he were to submit to answer it and omitted anything, he would be liable to criminal proceedings under 22 & 23 Vict. c. 35, s. 24. [368] He may have gained a knowledge of the title as solicitor to some other person; is he bound to disclose

I have said I must not be considered as altogether approving of the requisition being made in the form above mentioned. The answer to it might lead to the disclosure of what the purchaser would rather not know. The requisition should, I think, ordinarily be added to thus, "and which, if remaining undisclosed, may prejudicially affect the purchaser." Vice-Chancellor Wood, in *Drummond v. Tracy* (Johns. 608), seemed to consider (see p. 612) that a vendor's obligations were not merely coextensive with his obligations in respect of the contents of the abstract; and having regard to his judgment in that case, I cannot doubt that he would have held that the vendor's solicitor must answer all relevant questions in respect to existing liabilities, including such a question as the

requisition in question; and I consider that that judgment materially supports my decision, although it has been (and I think correctly) thought that the Vice-Chancellor's judgment in that case went too far.

1875. April 16. The order drawn up as of this day was "that the above-named A. Solomon, the vendor, do within seven days from the service of this order answer the third requisition of the said F. Davey as to whether the vendor is or his solicitors are aware of any judgments, settlements, mortgages, charges, or other incumbrances of any description affecting the property not disclosed by the abstract of the vendor's title," and that the vendor should pay the costs of the application.

(¹) 5th ed., p. 449.

knowledge so obtained? The inquiry, even if restricted to the vendor himself, is objectionable. The conditions bind the purchaser to accept a limited title; by this inquiry he tries to go beyond the contract, and to obtain information from which it debars him. Moreover, vendors are not usually acquainted with the title, and have to apply to their solicitors for information, so that, in whatever form it be put, this inquiry comes to an inquiry from the solicitor. In the present case the vendors are assignees of an insolvent, and know nothing of the title. If the inquiry is allowed at all, it ought to be qualified by a reference to the conditions of sale.

Levett, for the respondent: This question ought to be answered, for a purchaser is entitled to a complete abstract. A complete abstract ought to notice every incumbrance: *Dart's Vendors and Purchasers*⁽¹⁾; *Sugden's Vendors and Purchasers*⁽²⁾. The question therefore amounts to a question whether the abstract is complete, and the purchaser is entitled to an answer. He has a right to have the title "sifted to the bottom": *Knatchbull v. Grueber*⁽³⁾. In *Jenkins v. Hiles*⁽⁴⁾ Lord Eldon says: "The court never acts upon the fact that a satisfactory abstract was delivered, unless the party has clearly bound himself to accept the title upon the abstract. But though the abstract is in the hands of the party who says he cannot object to it, yet he may insist upon a reference. Why? Because the decree compels the other party to produce all the deeds, papers, &c., in his custody or power, from which reasonable and solid objections to the title may be furnished." It is within this principle that at all events the requisition should be answered so far as regards the question whether there are any incumbrances not appearing on the abstract. As regards the solicitors, it is argued that their answer might make them criminally liable, but they can only be made criminally liable if they act with a fraudulent intent.

369] [*JAMES, L.J.: You need not trouble yourself about that point.

BAGGALLAY, L.J.: Suppose a sale under conditions that the title should begin twenty years ago, must this requisition be answered as regards matters before that period?

I do not contend that it must; the purchaser would be satisfied if the inquiry was answered so far as regards the title which the purchaser is to have.

⁽¹⁾ 5th ed., p. 162, 808.

⁽²⁾ 7th ed., p. 410.

⁽³⁾ 3 Mer., 124, 137.

⁽⁴⁾ 6 Ves., 646, 653.

[JAMES, L.J.: The order under appeal is not so limited; it requires a full answer to a very wide and searching interrogatory.]

A vender is bound to disclose a latent defect, and if I ask him whether there is one, I am only asking him to do what the court holds it his duty to do. I rely on the principle of the two cases before Lord Eldon, and on the decision in *In re Solomon and Davey* (*).

[JAMES, L.J.: The obligation to answer such interrogatories would seriously embarrass a vendor resident abroad.]

That would only be an occasional inconvenience, and the Vice-Chancellor, in *In re Solomon and Davey*, intimates that in such a case the purchaser may be obliged to complete without an answer. It is much better for both parties that incumbrances should be discovered at an early stage. The practice of conveyancers is in favor of this kind of inquiry: *Dart's Vendors and Purchasers* (*).

[JAMES, L.J.: That requisition does not go nearly so far as yours.]

Drummond v. Tracy (*) is in favor of it, and the opinion of Vice-Chancellor Hall is entitled to great weight from his extensive practice as a conveyancer.

JAMES, L.J.: I am of opinion that the question put by the purchaser is anything but a requisition; it is a searching interrogatory put to the vendors and their solicitors. As I understand the law, a vendor is bound to furnish an abstract of title, and, upon the requisition of the purchaser, to verify it or complete it on any point on *which it [370] appears defective. That is evidence verifying the title shown by the abstract. But if, in addition to this, questions are to be asked for the purpose of negating the existence of incumbrances, where is the matter to end? There is no judicial authority in favor of such a requisition except that of the judge from whom the present appeal is brought. It is obvious from the expressions in Mr. Dart's book, and from what Mr. Christie is reported to have said, that the practice of asking such a question is of modern growth, and though the settled practice of conveyancers is to be looked upon as part of the common law, I do not think that a modern practice in which some conveyancers differ from others is to be treated as part of the law of the land, so as to make it part of a contract for the sale of land that the vendor subjects himself and his solicitors and agents to give answers to such questions as this. The introduction of new-fangled requisitions of this kind is dangerous and ought to be dis-

(*) *Ante*, p. 366 n.

(*) 5th ed., 450.

(*) *Joh.*, 608, 612.

couraged, as tending to increase the expense and delay in the investigation of titles, which already are almost a disgrace to the law of the country. What might be the result of such a question as that mentioned in Mr. Dart's book, "Are you aware of any document, judgment, or charge affecting the title in the property not noticed in the abstract, and which, if remaining undisclosed, may prejudicially affect the purchaser?" The vendor might say, "I know nothing about the title; I suppose that if there had been any incumbrance my solicitors would have disclosed it." How is the inquiry to be carried further? But in the present case the inquiry goes on to ask after "any fact or omission affecting the property." Is a vendor to be expected to remember every restrictive covenant to which the property is subject. A person in New Zealand may have occasion to sell his property in haste; is the sale to be delayed until an answer to this inquiry has been obtained from the antipodes? What is the good of such an inquiry? Every solicitor knows that he is subject to civil and criminal responsibility if he wilfully suppresses matters prejudicially affecting the title. The purchaser is entitled to say, "I have received this abstract; I presume that you remember the provisions of the act as to suppressing incumbrances, and that I may rely on 371] the abstract as being complete, and I warn *you that you incur criminal liability if it is not so." The order under appeal shows how difficult it is to apply the rule that such an inquiry must be answered, for it orders the solicitors to make a full, sufficient, and complete answer to the inquiry, an order for disobeying which they might be committed, and which could only be satisfied by every one of them making a declaration as to whether he knew of any incumbrance. This is a new practice, for which there is no authority, and I am of opinion that the purchaser's application ought to have been refused with costs. The vendors will have the costs of the appeal.

BAGGALLAY, L.J.: I am of the same opinion, and for the same reasons. It is conceded that the order cannot be sustained to its full extent, but it is contended that an answer ought to be given so far as regards judgment debts, incumbrances, or any other thing not appearing on the abstract which would prejudicially affect the title. Except as regards incumbrances, which can be found by the usual searches, this would not go beyond what a vendor's solicitor is bound to put in his abstract. I think that the establishment of a right to have an answer to such inquiries would lead to a loose way of transacting business. A solicitor might say to

himself, "I need not be particular about making my abstract complete, for there will be a requisition asking whether it is so, and that will give an opportunity of supplementing it. Such a course of practice would not only increase expense but cause additional obstacles in the way of investigating titles.

BRAMWELL, L.J.: I am of the same opinion. Contests as to the sale of real estate come more frequently before the Chancery Division than the other divisions; but in a common law division I think there would be no doubt in this case. Suppose that the vendor refuses to answer this requisition, and the purchaser thereupon refuses to complete and brings an action for his deposit. He would have to make out a breach of contract, and for that purpose must establish that the vendor had refused to answer a question which it was his duty to answer, or that a good title had not been shown. *He could not make out either of these [372 points. The ground on which the vendor would have succeeded at law is an equally good ground for his succeeding here—that there is no duty to answer such a question, and that a good title has been shown.

Solicitors: *Prior, Bigg, Church & Adams; Gregory, Rowcliffes & Rawle.*

[10 Chancery Division, 372.]

LUSH, J., Oct. 23: C.A., Nov. 2, 1878.

In re IVORY.

HANKIN V. TURNER.

[1878 I. 146.]

Letters of Administration—Res Judicata—Practice—Security for Costs—Rules of Court, 1875, Order LVIII, r. 15.

Letters of administration of the estate of an intestate were granted *ex parte* to the defendant, as "his natural and lawful brother of the half-blood." The plaintiff, who was an uncle of the intestate, then commenced an action in the Chancery Division for the administration of the estate, alleging that the defendant was illegitimate, and that he himself was next of kin; and moved for a receiver and an injunction:

Held, by LUSH, J., that the application must be refused, for that as long as the letters of administration remained in force they were conclusive evidence that the defendant was one of the next of kin, and that the plaintiff's proper course of procedure was to apply in the Probate Division to have them recalled.

The plaintiff, who was in receipt of parochial relief, having appealed from this refusal, was ordered by the Court of Appeal to give security for the costs of the appeal, the court being of opinion that the appeal was a speculative one.

Per COTTON, L.J.: The insolvency of an appellant is, *prima facie*, a sufficient reason for ordering him to give security for costs.

JAMES IVORY having died on the 2d of September, 1878, intestate, letters of administration to his estate were, on the 30th of September, 1878, granted *ex parte* to the defendant, as the intestate's "natural and lawful brother of the half-blood."

The plaintiff, who was the maternal uncle of the intestate, commenced an action in the Chancery Division on the 8th of October, 1878, against the defendant for the administration of the personal estate of the intestate, and for a receiver and injunction, alleging the defendant to be illegitimate and himself to be the sole next of kin.

373] *On the 23d of October, 1878, the plaintiff moved before Mr. Justice Lush for a receiver and injunction.

Phear, for the motion.

Marten, Q.C., and *Jason Smith*, for the defendant: The court will not entertain an application which proceeds on the footing that the defendant does not fill that character on the ground of which the Probate Division granted administration are granted to him. The letters of administration are granted under statute, and if the defendant was no relation he had no right to them. But the propriety of granting them cannot be disputed here. The granting administration, though without litigation, is a judicial act: *Allen v. Dundas* ⁽¹⁾. The court, in granting the letters, proceeded on the footing that the defendant was a half-brother, and that amounts to a decision of the court that he was so, *Barrs v. Jackson* ⁽²⁾; and that is conclusive till the letters are recalled. The plaintiff is seeking to fix a trust on the defendant on a ground which goes to the legal title as well as the beneficial title, and the Probate Division is the proper forum: *Meluish v. Milton* ⁽³⁾. The court cannot go behind the letters of administration and treat them as good for one purpose and bad for another: *Pinney v. Hunt* ⁽⁴⁾.

Phear, in reply: The title claimed by the defendant is twofold—legal and beneficial. I only dispute his beneficial title, and the Probate Division has not adjudicated upon that. Suppose a creditor obtained letters of administration, and then another creditor instituted an administration suit, and it ultimately turned out that the administrator was not a creditor, surely it would not be necessary to have the letters of administration revoked in order to prevent his obtaining payment. The *ex parte* statement of a person who obtains a grant of administration cannot estop other people. Again, if one of the next of kin obtained a grant

⁽¹⁾ 3 T. R., 125.

⁽²⁾ 1 Ph., 582.

⁽³⁾ 3 Ch. D., 27; 17 Eng. R., 771.

⁽⁴⁾ 6 Ch. D., 98; 22 Eng. R., 673.

of administration, alleging himself to be sole next of kin, would a grant to him *as such preclude the other [374 next of kin from obtaining their shares until the letters were revoked? If the Crown takes out administration on the ground that there are no next of kin, and then next of kin turn up, they always obtain their rights in an administration suit without any recall of the letters of administration. The only title conferred by the letters of administration is a legal title, and when granted *ex parte*, though it might be otherwise if the plaintiff had been cited, they do not involve any adjudication on the beneficial title. The cases do not show that the grant of probate is conclusive as to anything more than who is personal representative and what are the contents of the will, nor that the grant of administration is conclusive as to anything more than who is legal personal representative.

LUSH, J.: I am of opinion that this is not a question which this court can entertain, and that this motion ought to be refused.

The application is, in substance, to revoke or to neutralize the letters of administration. This is not a case where the applicant claims community of interest with the administrator. If he had admitted that the administrator was one of the next of kin, alleging himself to be another, it would be a different matter; but his case is that the administrator is not of kin at all to the intestate, and therefore not entitled at all to the administration. This is not a special administration, nor is it a limited administration, but it is the ordinary administration granted under the statute. The statutes 31 Edw. 3, s. 1, and 21 Hen. 8, c. 5, s. 3, oblige the court to grant administration to the next of kin, and it is only in default of any next of kin applying for it, and in case of their refusing to take out letters of administration, that administration may be granted to a creditor. The present administrator applied for letters of administration as the next of kin, and, as the next of kin, they were granted to him. If he was not the next of kin, the Probate Division has been deceived, and the application must be made to that court to revoke its grant. It can only grant administration to the next of kin, and if the party applying is not the next of kin, the court has no power to grant it to him; although, so long as the letters remain, they are binding upon this *and every other court. I do not think that that is [375 now in issue. I do not say that it is not competent for this court to try the matter since the Judicature Act, but the

Probate Division is certainly the proper division in which to try it. It is admitted by Mr. Phear that if the present applicant had been cited, and the court had upon hearing the parties determined that the present administrator was the next of kin, that question could not be re-opened in any other division of the High Court. There are abundant authorities for that proposition. Those authorities hold good notwithstanding that this was not a contentious suit, because the granting of the letters of administration is a judicial act of the court, and if the Probate Division has been deceived, and granted them to the wrong persons, that court is the proper tribunal to set the matter right and to grant administration to the right persons; but as long as these letters of administration are in force I do not think I can entertain the application here by Mr. Phear's client, which is in fact to make the defendant a trustee for him, although he obtained the grant in another character. Mr. Phear says, give me all the assets and let him do all the duty. That is not the footing on which he applied for and obtained the letters of administration. The right to administration follows the right to the property, and if the party has no right to the property he has no right to the letters of administration. I think that the application must be to the Probate Division to revoke the letters of administration now existing and to grant them to Mr. Phear's client as sole next of kin.

The motion will be refused with costs.

The plaintiff appealed from this refusal. On the 2d of November the defendant moved that the plaintiff might be ordered to give security for the costs of the appeal. It was deposed to, and not denied, that the plaintiff was a pauper receiving outdoor parish relief.

Marten, Q.C., and *Jason Smith*, for the motion, referred to Order LVIII, r. 15.

Phear, for the plaintiff: Poverty alone is not a sufficient 376] ground for ordering security for *costs, as was held by the Court of Appeal in *Usil v. Brearley* (*). The appeal here is reasonable. I am not seeking to interfere with the appointment of the administrator by the Probate Division, and there is therefore no sufficient ground why I should be put to proceed in that division. I am only asking to have the assets administered according to the true beneficial title. The object of this application is only to embarrass the plaintiff, for the appeal might be heard at no greater expense than the present motion.

(*) 3 C. P. D., 206.

EARL CAIRNS, L.C.: I entertain no doubt that this is a case in which security for the costs of the appeal ought to be given. The circumstances are singular. The plaintiff alleges that he stands in a particular relationship to the deceased; that he was his maternal uncle, and is his next of kin or one of his next of kin. The defendant alleges that he is the half-brother of the deceased, and is his next of kin or one of his next of kin, and has obtained letters of administration on that footing. The plaintiff says that the defendant is illegitimate, and therefore not one of the next of kin; he takes no step to have the letters of administration recalled, but his case is, "I am entitled to sue you here, and call upon you to administer the property which you hold under an instrument alleging you to be one of the next of kin in a manner wholly inconsistent with your being one of such next of kin." This seems an attempt to do what is called in Scotch law approbating and reprobating, to claim the benefit of the services of the defendant upon the footing of his being a legitimate relation of the intestate, and to assert at the same time that he is not such a relation. The person conducting this contest is stated in evidence to be a pauper receiving parochial relief, and this evidence is not rebutted. It is not necessary to decide, and I do not wish to decide, what does not arise, whether in every case where the appellant is a pauper the court will require security for costs; but certainly, where a pauper comes forward to engage in such a contest as this there are special circumstances which will induce the Court of Appeal to order him to give security.

*BAGGALLAY, L.J.: I agree that in circumstances [377 such as those of the present case security ought to be given.

BRETT, L.J.: I am of the same opinion.

COTTON, L.J.: I also am of the same opinion. I think that the insolvency of an appellant is *prima facie* a sufficient reason for ordering him to give security for costs, though in some cases the court may not order him to do so. In the present case there is nothing to exempt him from giving security.

The appellant was ordered to deposit £20 in court, and having failed to do so, the appeal was on the 27th of November dismissed for want of prosecution.

Solicitors: *W. Millman; W. Richard Preston.*

That letters of administration are conclusive when attacked collaterally, if issued by a court having jurisdiction to grant them: see 24 Eng. R., 243 note; *ante*, 12 note; *Sullivan v. Fos-*

dick, 10 Hun, 174; *Illinois, etc., v. Cragin*, 71 Ills., 177; *Moreland v. Lawrence*, 23 Minn., 84.

As to validity of letters granted upon estate of a living person, see 1 Am. Law

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Brown v. Smith.

C.A.

Rev. (N.S.), 337, 21 Alb. L. J., 65, 84, 30 Am. Rep., 748 note.

Where a surrogate having jurisdiction to grant letters on the death of a party, grants such letters, and it turns out the party supposed to be dead be living, a payment made to the representative so appointed is valid: *Roderigas, etc., v. East, etc.*, 68 N. Y., 460.

Contrà: *Jochumsen v. Savings Bank*, 3 Allen, 87; *D'Abusmont v. Jones*, 22 Alb. L. J., 229, 11 Cent. L. J., 253, Tenn. Sup. Court; *Melia v. Simmons*, 45 Wisc., 334, 30 Amer. Rep., 746, 748 note.

Otherwise if letters granted, where letters were issued by a clerk without the surrogate passing upon the question: *Roderigas v. East, etc.*, 76 N. Y., 319, affirming 43 N. Y. Superior Ct. R., 217.

See 1 Am. Law Rev. (N.S.), 337.

Where letters of administration are procured from a probate court by fraudulent representations or concealment, the court granting such letters has power to revoke them, and to grant

new letters to the proper person: *Haddon v. Lundy*, 59 N. Y., 321, affirming 3 Thomp. & Cook, 777; *Bailey v. Hilton*, 14 Hun, 3, 6-7; *Irwin v. Bank*, 38 U. C. Q. B., 375; *Matter of Cohen's Estate*, 58 How. Pr., 496; *O'Gara v. Eisenlor*, 38 N. Y., 296; *Proctor v. Wantmaker*, 1 Barb. Chy., 302; 3 Redford on Wills (2d ed.), 115; 2 id. (1st ed.), 103-4; *Kerr v. Kerr*, 41 N. Y., 272; *Matter of Clement*, 25 N. J. Eq., 508, 510 and numerous cases cited.

See *Estate of Miliken*, 1 Myrick Prob. Rep., 88; that same thing will be done if granted without jurisdiction *in fact*.

Though until revoked they are valid, if the court had jurisdiction, and any payment or other act by the representative *de facto* is valid: *Irwin v. Bank*, 38 U. C. Q. B., 375; *Roderigas v. East, etc.*, 68 N. Y., 460.

When issued to a competent person, they will not be revoked upon a subsequent claim by one who was incompetent at the time: *Sharpe's Appeal*, 87 Penn. St. R., 163.

[10 Chancery Division, 377.]

M.R., July 8: C.A., Nov. 5, 1878.

BROWN V. SMITH.

[1878 B. 301.]

Infant—Maintenance—Allowance for past Maintenance.

A person who was tenant for life under a will of a property producing a net income of about £140, died insolvent in 1853, leaving a daughter not a year old, who thereupon became entitled to the property, and a widow. The father was the son of a retired tradesman in a small way of business. In November, 1853, the widow being wholly without means of support, an order was made directing the whole income to be applied for the maintenance of the infant, and directing the two persons who were trustees of the will to pay it to the widow for that purpose. One of the trustees died in 1861. In 1863 the widow married a gentleman of good position but small means. No fresh application to the court was made, but the surviving trustee went on paying the whole income to the mother till 1873, when the daughter came of age. The daughter then filed her bill, alleging that after her mother's second marriage the payment of the whole income to her was improper, and asking to have an account of the past income, and to have the balance of it [378] paid to herself after deducting a proper allowance for her maintenance and education. It was shown that the plaintiff had been well educated, and had lived as a lady, that her social position had been much improved by her mother's marriage, and that the income, so far as not expended on herself personally, had been applied towards the expenses of the step-father's establishment, of which she had the benefit:

Held, by the Master of the Rolls, that the order for maintenance ceased to be operative on the death of one of the trustees, but that the allowance of the whole income for maintenance would, under the circumstances, have been sanctioned by the court if applied to on the death of the trustee, and again on the mother's mar-

riage, and that the whole income ought, therefore, now to be treated as having been properly applied.

On appeal, the decision that the income ought to be treated as properly applied was affirmed, but the court was of opinion that the order for maintenance had come to an end only on the marriage of the mother, and not on the death of the trustee.

JOHN RATTRAY died on the 25th of May, 1853, intestate and insolvent. He had been tenant for life of real and personal estate under two wills, of which Mark Smith and Michael Paterson were the trustees. Upon his death this property devolved upon his daughter and only child, the plaintiff, as regards the personalty absolutely and as regards the realty in tail. She was born on the 29th of July, 1852. The gross income of the property was about £160, and the net income about £140.

On the 17th of June, 1853, the trustees of the wills applied in chambers, in the matter of the infant, for an order for a guardian and maintenance. By the direction of the judge the summons was amended by making it an application by the infant by her next friend, and, upon evidence that the infant's mother was wholly without means of support, Vice-Chancellor Stuart, on the 8th of November, 1853, made an order that the whole of the income should be allowed for the maintenance and education of the plaintiff from the death of her father, and should be paid by Smith and Paterson to the mother for that purpose during the minority of the plaintiff, or until further order.

Paterson died on the 4th of March, 1861. In 1863 Mrs. Ratray married Captain Weatherley. No application was made to the court, but Smith, without any further order, continued to pay the whole income of the property to Mrs. Weatherley until July, 1873, when the plaintiff attained twenty-one. Captain Weatherley died in 1872, and Mrs. Weatherley was his executrix. The plaintiff, *until [379 she attained twenty-one, resided with her mother before, during, and after the second coverture.

On the 29th of July, 1873, the plaintiff intermarried with Thomas Watson Brown, and on the 11th of September, 1873, filed her bill against Mark Smith, Mrs. Weatherley, and the representatives of Paterson, alleging that after Mrs. Weatherley's second marriage the payment of the plaintiff's whole income to Mrs. Weatherley was improper, and that the balance of such income, after deducting £50 a year, or such sum as the plaintiff's maintenance and education cost, or ought to have cost, ought to be repaid out of the assets of Weatherley, so far as he received it, and by Mrs. Weatherley so far as she received it, and ought, if neces-

sary, to be decreed to be made good by the trustees, and praying for relief on that footing.

On the 17th of December, 1875, the cause came on before the Master of the Rolls, who was of opinion that on the death of Paterson an application ought to have been made to the court to sanction the continuance of the payments by the surviving trustee, and that the payments from that time were made without authority. His Lordship made a decree containing an inquiry "whether the whole of the net income of the plaintiff, after expenses and repairs as from and after the 4th of March, 1861, the date of the death of the said Michael Paterson, was, under the circumstances, proper to be allowed for the maintenance and education of the plaintiff during her minority, and if not, to inquire how much is proper to be allowed, and, if it shall be found that the whole of such net income was not proper to be allowed, then" an account was directed of income of the plaintiff come to the hands of Mark Smith and of Mr. and Mrs. Weatherley after the 4th of March, 1861, during the minority of the plaintiff.

The Chief Clerk, on the 27th of May, 1878, certified that the whole of the net income of the plaintiff from and after the 4th of March, 1861, was, under the circumstances, proper to be allowed for her maintenance and education during her minority. The plaintiff applied to vary this certificate.

Upon this inquiry the plaintiff made an affidavit complaining very much of the way in which she had been treated during her minority, and aiming at showing that 380] nothing like the whole *amount of the income had been expended in her maintenance and education, a proper allowance for which, she contended, would be £80 a year. It appeared that the plaintiff's father, who, as above stated, had died insolvent, was the son of a tradesman who had retired upon a very small property. Captain Weatherley, who had been a captain in the Northumberland militia, was a gentleman moving in good society, though his means were not large; and several independent witnesses, who had been friends of his, deposed that the plaintiff had been educated as a lady, was always dressed as such, brought into good society, and treated by her step-father with great kindness, and that her social position had been very much improved by her mother's marriage.

The summons to vary was heard before the Master of the Rolls on the 8th of July, 1878.

Waller, Q.C., and Bunting, for the application to vary

the certificate: The Chief Clerk's certificate ought to be varied, as the whole of the plaintiff's net income, amounting to about £140 a year, was much more than was necessary for her maintenance, and more than ought to have been allowed to Mrs. Weatherley. So much of the income paid to her since her marriage as is shown by the evidence not to have been expended for the plaintiff's maintenance or benefit ought to be disallowed.

Marten, Q.C., and Phillpotts, for the mother.

Roxburgh, Q.C., and Russell Roberts, for the surviving trustee.

Chitty, Q.C., and Crossley, for the representatives of the deceased trustee.

JESSEL, M.R., after stating the circumstances of the case, continued: The question I have to consider is, whether a fair allowance was made to the mother under all the circumstances, and whether the child was fairly and properly maintained and educated. It is not the practice of the court when it allows these moderate sums of £100 or £200 a year to a parent or relative to inquire too minutely [381] into the mode in which the sum is expended. It is supposed that the person who takes that child into his or her house does not keep separate accounts of every item of rent and taxes, of every bit of furniture bought for the use of the infant, or bought for the use of other people, and of the number of rides in the carriage the infant takes as compared with the other members of the household. That is not the meaning of it. What the court does is to allow a fair sum for the maintenance and education of the infant, and to see that the infant is fairly maintained and educated having regard to the sum allowed. The court frequently allows a larger sum than is actually required for the maintenance of the infant on purpose. For instance, it may be that it is more to the advantage of the infant to pay the larger sum in order to induce the person to take the infant. I will give an illustration of that by mentioning a case which occurred not very long ago in my chambers. There was a young lady of very large fortune who had attained an age at which it was desirable to introduce her into society. She had neither mother nor father: It was represented to me that a lady of excellent rank, but whose income was by no means such as to enable her to live in the style she desired to do, was willing to take the young lady and introduce her into society on receiving a very considerable allowance. On considering it, I came to the conclusion that it was a very desirable arrangement for the young

lady, and I made this allowance, which was more than was required for the infant, the balance being expended on the establishment, which would, no doubt, ultimately tend to the infant's benefit, although the sum expended very much exceeded anything which was the actual cost of the infant's maintenance.

In all these matters we look to the infant's benefit. It constantly happens in the case of relatives that they would be willing to take the infant as a member of their family. Nothing would be more advantageous for an orphan girl, for instance, than that she should be brought up by a relative, and with her cousins and other relatives; but you cannot expect that a person would take the infant for the bare cost of her maintenance and education; as a general rule this would not be done; and then the question arises, how much is it worth the while of the guardian to pay, having 382] *regard to the interest of the infant, over and above the cost of maintenance, to induce these people to undertake the charge.

In the case of girls, I have been often willing to pay a very considerable sum, because I know how essential it is for their interest that they should have around them the protection of members of their own family of mature age who have an interest in their welfare, and who would guard them from the numerous temptations and dangers to which girls between the ages of sixteen and twenty-one are especially liable. It by no means follows that it was not a proper thing, and not the best thing in the world, to pay to the step-father more than the cost of the infant, in order to procure the right to remain in his house, and to visit with his friends, and to enjoy the society and other advantages which are annexed to such a position. I think it is wrong to reckon up the number of shillings or the number of pounds exactly that the infant costs. You must look at the whole circumstances together, and say whether the allowance made was not a fair allowance. Looking to these circumstances, having regard to the evidence which has been adduced, and not saying a word against the desire to tell the truth on both sides (I think probably some deduction should be made from the statements of both sides), I do not think the court would have hesitated for one moment in granting this allowance of £135 or thereabouts for the maintenance of the young lady until she attained the age of twenty-one. I think it not only not an unfair allowance, but a fair and moderate allowance. Therefore I think the Chief Clerk's certificate must be affirmed with costs.

The plaintiff appealed from this decision. The appeal was heard on the 5th of November.

Waller, Q.C., and *Bunting*, for the appellant: The order for payment to the mother came to an end by the death of one of the trustees, as the direction to pay was only given to the two, and the Master of the Rolls so held.

[BAGGALLAY, L.J.: Can that be so in the case of a mere order to make payments to a third person?

COTTON, L.J.: A power given by the court to two persons *would no doubt come to an end by the death [383 of one; but I do not agree that such is the case with a positive direction to do an act involving no discretion.]

At all events the direction to pay to the mother became inoperative on her marriage. A fresh state of circumstances then arose, which ought to have been brought to the attention of the court. A large allowance had been made because it was considered for the benefit of the child to remain with the mother, and it was necessary to allow enough to maintain her as well as the child; but she might have married a millionaire, in which case the reason for so large an allowance would clearly have ceased. The Master of the Rolls treated this as a case of prospective maintenance; but we say that it is a case of past maintenance, and that *Bruin v. Knott* (1) applies. That case decides that in allowing past maintenance you cannot go beyond what has actually been expended, and here we have evidence to show that not nearly the whole income was expended for the benefit of the plaintiff.

[BAGGALLAY, L.J.: Does not the form of the inquiry assume that the whole income has been expended?

COTTON, L.J.: My present impression is that this inquiry answers to that directed by the Vice-Chancellor in *Bruin v. Knott*, and not to that directed by the Lord Chancellor.]

We submit that it is substantially the same as that of the Lord Chancellor, and leaves the question open whether the whole income has been expended on the minor; and the evidence shows that the expenses of her maintenance and education amounted to far less than the whole income.

Roxburgh, Q.C., and *Russell Roberts*, for the surviving trustee;

Chitty, Q.C., and *Crossley*, for the representatives of the deceased trustee; and

Marten, Q.C., and *Phillpotts*, for the mother, were not called upon.

(1) 1 Ph., 572.

BAGGALLAY, L.J.: At the hearing of this cause the Mas-
384] ter of the Rolls directed an *inquiry whether the
whole of the income as from the 4th of March, 1861, was,
under the circumstances, proper to be allowed for the main-
tenance and education of the plaintiff. This inquiry has
been answered in the affirmative, the certificate has been
confirmed by the Master of the Rolls, and I entertain no
doubt that his Lordship was right in dismissing an applica-
tion to vary it. The circumstances of the case are peculiar.
The order made by Vice-Chancellor Stuart in 1853 was one
quite in accordance with the practice of the court. Where
the mother of an infant has no means the court will grant
her an allowance out of the infant's income beyond what
would be the expense of having the child maintained by a
stranger, it being considered to be for the benefit of the child
that it should reside with the mother, and that the allowance
should be of such an amount as to make this practicable.
The order directed that the whole income should be allowed
for the plaintiff's maintenance and education, and directed
the trustees to pay it to the mother for that purpose until
the infant attained twenty-one, or until further order. One
trustee died in 1861, and the survivor continued to make
the payments. A suggestion has been made that the order
ceased on the death of one of the trustees, because it was an
order upon the two. It is not, in my opinion, necessary to
decide that question; for if a surviving trustee goes on
making payments which the two have been ordered to
make, without any discretion being given to them, he ought,
in my opinion, to be indemnified in respect of the payments
so made by him. A more serious question is, whether the
order did not cease to be operative upon the mother marry-
ing. I am of opinion that it did, and that the proper course
would have been for the surviving trustee, or the next
friend, to bring the case before the court. We must then
consider what the court would probably have done if the
matter had been brought before it. The court had thought
it right during the child's early infancy to allow the whole
income, having regard to its being for the child's benefit to
live with the mother. Suppose the mother had died, and a
proposal had been made that the child should be placed
with a married woman whose husband was in the same
social position as Captain Weatherley, and that the whole
income should be allowed for her maintenance and educa-
tion. I think the court would have sanctioned such a
385] scheme as being for the *infant's benefit. If in such
a case the court would have allowed the whole income,

would it not have done so in the case, which happened, of the mother marrying a gentleman of good position, but small means. The advantages the infant enjoyed in his house, where it is shown that she was treated with great kindness and brought up as a lady, could not have been obtained if only a sum sufficient for her bare maintenance had been allowed. I collect from the judgment of the Master of the Rolls that this was his view when he directed the inquiry in the decree. We, however, have now only to deal with the answer to that inquiry; we cannot consider whether the inquiry is in the proper form, as there is no appeal from the order directing it. *Bruin v. Knott* (') has been referred to, but I am not sure that it is applicable. In that case the mother had applied money for the child's maintenance without any authority. She might not have expended as much as the court if applied to would have allowed, and if she had not expended the whole there was no reason why she should be allowed the whole. Here there is no doubt that the whole sum was expended, for it is not attempted to show that the mother made savings out of it. We must proceed then on the footing that the whole was expended in keeping up the establishment of the mother and step-father, of which the plaintiff had the benefit. Did the plaintiff thus receive a benefit which she would not have had if confined to the sum necessary to be expended directly on herself? It appears to me that she clearly did, and that the course of proceeding adopted was to her advantage. There was an irregularity in not applying for directions on the mother's marriage, but I think that the expenditure was such as the court, if then applied to, would have sanctioned, and that neither the trustee nor the persons to whom he paid the income can be held to be subject to any liability in respect of it.

BRETT, L.J.: The inquiry under which the certificate before us was made was directed after the whole income had been expended without the sanction of any order that remained in force, the order having become inoperative by the marriage of the mother, and it is *therefore an [386 inquiry as to past maintenance. It appears to me, whether *Bruin v. Knott* (') supports that view or not, that there must be a great difference between the cases of future and past maintenance. In the first case there cannot be any inquiry as to what has been expended, but only as to what ought to be allowed to be expended. In the second case two questions arise, first, what would the court have allowed;

(') 1 Ph., 572.

and, secondly, what amount has been expended. The court cannot allow the trustee all he has expended if he has expended more than it would have sanctioned; and it cannot allow him as much as it would have sanctioned if he has not expended so much. One phrase may comprise both or only one of these questions. "What is proper to be allowed" may mean "what do I now judge that the court would have allowed if applied to at the time," or "what amount ought now to be allowed to the trustee in passing his accounts." I take it in favor of the plaintiff that the inquiry in the decree meant what ought now to be allowed to the trustee so as to include the two questions. If that is not the true construction of the order the plaintiff is driven to the contention that the order left the wrong question to the Chief Clerk, which contention cannot be raised, as there is no appeal from the decree. But I take it, as I said, to include the two questions. Now, on the evidence it is clear that the money was expended. If any of it had been applied in making up a purse for the mother, the case would have been entirely different, but it is clear that the whole money was expended either in the maintenance and education of the plaintiff, or in keeping up the establishment of which she had the benefit. It is urged on her behalf that nothing ought to be allowed but what was directly expended on herself. That is not the right way of looking at the case, we must consider what the court would have allowed, having regard to the advantage of her living in a family in this position. I think the test proposed by the Lord Justice Baggallay is the true one: What would the court have allowed to secure to the young lady the advantage of being brought up in such a family as this if they had been strangers? and I cannot doubt that the court would have allowed the whole income. The decision of the Master of the Rolls, therefore, appears to me clearly right.

387] *COTTON, L.J.: The only question before us is, whether a right answer has been given to the inquiry. If that inquiry was not such as to leave it open to the plaintiff to raise some of the questions which have been argued, we cannot alter it. I give no opinion whether the case of *Bruin v. Knott* (') is applicable. The trustee in the present case paid the income of the plaintiff's property to the mother, under the mistaken idea that the order which had been made authorized such payment, which after the marriage of the mother was not the case. I give no opinion whether the inquiry directed by the Master of the Rolls was in substance the same as that of the Vice-Chancellor in *Bruin v. Knott*,

(') 1 Ph., 572.

or was to the same effect as that of the Lord Chancellor. I will assume that it was of the latter character. The money was expended for the purposes of the establishment of which the plaintiff had the benefit. If the mother had made a purse out of it, very different considerations would have arisen. It is clearly shown that the plaintiff was educated properly and brought up as a lady, in a way much superior to what was to be expected from the circumstances of her father and the amount of her property. Then, adopting the principle of *Bruin v. Knott*, we have the question, was this money expended for the benefit of the infant, and was it properly so expended? I am of opinion that both questions must be answered in the affirmative, and that the decision of the Master of the Rolls is right. Having regard to the circumstances, I think that the income was expended in a way which the court would have sanctioned if an application had been made at the time of the mother's second marriage.

The appeal was dismissed with costs, and liberty was given to apply at the Rolls for payment out of the estate of such costs as could not be recovered from the next friend, the court intimating some doubt whether such an application would be successful as to the representatives of the deceased trustee.

Solicitors: *J. W. Hickin; R. W. Busby; Smith, Fawdon & Low.*

[10 Chancery Division, 388.]

V.C.B., July 18: C.A., Nov. 13, 1878.

**In re LEADBITTER.*

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Taxation of Costs—Bill of Costs paid by Trustee in Bankruptcy—Application for Taxation by discharged Bankrupt—Solicitors Act (6 & 7 Vict. c. 73), s. 39.

A bankrupt who has obtained his discharge and who has become entitled to the surplus of his estate, all the creditors having been paid in full, is not entitled, under the 39th section of the Solicitors Act (6 & 7 Vict. c. 73), to obtain the taxation of a bill of costs paid by the trustee in the bankruptcy.

The trustee in bankruptcy does not stand in the position of a trustee for the bankrupt.

[10 Chancery Division, 393.]

C.A., Nov. 18, 1878.

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*TILDESLEY V. HARPER⁽¹⁾.

[1876 T. 67.]

Pleading—Leave to amend—Evasive Denial—Rules of Court, 1875, Order XIX, rr. 17, 22.

In an action against a lessee to set aside a lease granted under a power, the statement of claim stated that the donee of the power had received a specified sum as a bribe, and stated the circumstances; the statement of defence denied that that particular sum had been given, and denied each circumstance, but contained no general denial of a bribe having been given. Fry, J. having held that the denial was evasive, and amounted to an admission that some bribe had been given, and having refused leave to amend the statement of defence:

Held, by the Court of Appeal, that leave to amend the statement of defence ought to be given.

Per BRAMWELL, L.J.: As a general rule leave to amend ought not to be refused unless the court is satisfied that the party applying is acting *mala fide*, or that his blunder has done some injury to the other side which cannot be compensated by payment of costs or otherwise.

Whether the defendant ought on the pleadings to be held to have admitted the acceptance of some bribe, *quære*.

THIS was an appeal from a judgment of Mr. Justice Fry (*).

The action was brought by Matthew Tildesley, the executor and trustee of the will of Mary Hitchcocks and several infants, *cestuis que trust* under the will, against certain mortgagees, and against W. H. Anderson, a lessee, claiming to have the mortgages and the lease set aside. As to the lease the statement of claim stated that Mary Hitchcocks by her will authorized and empowered Matthew Tildesley, or other the trustees of her will, to demise and lease all or any part of her real estate to any person or persons for any 394] *term or number of years not exceeding twenty-one years, so that in every such case there should be reserved the most improved yearly rent that could be reasonably obtained for the same; that a part of the estate of the testatrix consisted of a freehold inn called the Golden Fleece, and two houses behind it; and that by an indenture of lease dated the 31st of December, 1873, Matthew Tildesley, in alleged exercise of the power in that behalf contained in the aforesaid will, purported to lease the inn and the two houses to W. H. Anderson for twenty-one years, at £200 a year rent. The statement of claim then stated as follows: "When such alleged lease was granted the defendant Anderson knew that the plaintiff Matthew Tildesley was a trustee only of the

(1) Reversing 7 Ch. Div., 403.

(*) 7 Ch. D., 403.

said Golden Fleece Inn and premises, with a power of leasing. The said rent of £200 was not, and both the plaintiff Matthew Tildesley and the defendant Anderson knew it was not, the most improved rent that at the date of such lease could have been obtained for the said premises. Such premises were at the date of such lease, as they are now, worth £350 per annum or thereabouts. The defendant Anderson, however, knowing as he did that the plaintiff Matthew Tildesley was in straitened circumstances at the time, offered him the said Matthew Tildesley personally a bonus, and in fact a bribe, of £500 if he would grant him the said lease for twenty-one years at the rent of £200, and arranged to give him such sum of £500 if he would grant such lease, and the plaintiff Matthew Tildesley being at the time very hard pressed for money accepted such offer and assented to such arrangement, and in fact granted Anderson the said lease in consideration of such bribe and in pursuance of such arrangement. And the defendant Anderson has in pursuance of such arrangement and in fact paid to the plaintiff Matthew Tildesley £200, part of the said £500. Under the above circumstances the plaintiffs charge that the said lease was not granted *bona fide* nor in a proper exercise of the said power of leasing, and that it is not binding on the plaintiffs, and ought to be set aside."

The statement of defence of W. H. Anderson was as follows: "The said rent of £200 was the most improved rent that at the date of such lease could have been obtained for the said premises. The defendant William Henry Anderson denies that such premises *were at the date of [395 such lease worth £350 per annum or thereabouts. The defendant William Henry Anderson denies that he knew that the plaintiff Matthew Tildesley was in straitened circumstances at the time. The said defendant denies that he offered the said plaintiff personally a bonus and in fact a bribe of £500 if he would grant him the said lease for twenty-one years at the rent of £200, and that he arranged to give him such sum of £500 if he would grant such lease, and that the said plaintiff, being at the time very hard pressed for money, or in fact accepted such offer and assented to such arrangements, and in fact granted the said defendant the said lease in consideration of such bribe and in pursuance of such arrangement. The said defendant denies that he has in pursuance of such arrangement and in fact paid to the said plaintiff Matthew Tildesley the sum of £200, part of the said sum of £500."

The plaintiff replied to the defence, and both parties went

into evidence. The defendant Anderson filed an affidavit, in which he distinctly denied having given any bribe at all.

When the action came on for trial Mr. Justice Fry was of opinion that the giving of a bribe was not sufficiently denied by the statement of defence, and must be taken to be admitted under Order XIX, rule 17, and he refused to give the defendant leave to amend his defence, but at once gave judgment for the plaintiffs.

From this decision the defendant Anderson appealed.

Fischer, Q.C., and *C. Herbert Smith*, for the appellant: The defendant has sufficiently denied the charge of bribery made in the plaintiffs' statement of defence, for he has categorically denied each of the allegations. Even if there is no denial of having given some bribe, that is not an admission of the fact, for the mere omission to deny a fact is no admission of it unless the fact is alleged in the statement of the other party. This is shown by Order XIX, rule 17. And so the plaintiffs understood the effect of the defence, otherwise they would have moved for judgment on the admissions under Order XL, rule 11. Instead of which they have joined issue and put the defendant to the expense of bringing up his witnesses.

If the judge was right in his view of the pleadings, he 396] ought to have given the defendant leave to amend. By his refusal great hardship has been inflicted on the defendant, who has been, from a mere slip in the pleading, deprived of his lease, under which he has expended considerable sums, and also deprived of the opportunity of meeting the charge of bribery. There can be no question of the *bona fides* of the defence, because the defendant, before he knew that the statement of defence would be objected to as insufficient, had filed an affidavit denying the charge of bribery altogether.

Cookson, Q.C., and *Maclean*, for the plaintiffs: Under the present system the rules as to pleading are to be construed strictly: *Thorp v. Holdsworth*(¹). With respect to the leave to amend, it is entirely within the discretion of the judge. His Lordship, on considering the whole of the pleadings, came to the conclusion that the defence as to the charge of bribery was not *bona fide*, and the Court of Appeal ought not to interfere with his discretion.

THE COURT having intimated a strong opinion that leave to amend ought to have been given, they declined to argue the question further.

BAGGALLAY, L.J.: We all think that leave to amend ought to be given. The order will be to discharge the judg-

(¹) 3 Ch. D., 637.

ment of Mr. Justice Fry, with liberty to the defendant to amend his statement of defence; the plaintiffs to pay the costs of the appeal; and the costs of the day of trial in the court below to be costs in the cause. The plaintiffs will also be at liberty to amend their pleadings.

BRAMWELL, L.J.: I think Mr. Cookson has exercised a wise discretion in retiring from the discussion. In my opinion the defendant ought to have been allowed to amend his statement of defence. I have had much to do in chambers with applications for leave to amend, and I may perhaps be allowed to say that this humble branch of learning is very familiar to me. My practice has always been to give *leave to amend unless I have been satisfied that [397 the party applying was acting *mala fide*, or that, by his blunder, he had done some injury to his opponent which could not be compensated for by costs or otherwise. I confess that if the present case had come before me I should have had some doubt whether the defendant had made a *bona fide* mistake, as the mistake is so very obvious. I should probably have required some affidavit or statement by the solicitor to show that the slip in the pleading was a *bona fide* one, and if satisfied on that point, I should not have refused leave to amend. Mr. Justice Fry seems to have thought it right to trust to his own strong impression that the pleader could not have pleaded as he had done unless there had been *mala fides*, rather than to the positive affidavit of the defendant, who had sworn, before he knew that any objection could be taken to the pleading, that he had not given any bribe. It is quite right that the rules of the court should be observed, and that a party should be fined for his mistake, but the fine should be measured by the loss to the other side, and not by the importance of the stake between the parties.

THESIGER, L.J.: I am also of opinion that it is important that the rules of the court as to pleading should be enforced, but this may be done at too great a price. The object of these rules is to obtain a correct issue between the parties, and when an error has been made it is not intended that the party making the mistake should be mulcted in the loss of the trial.

As to the substantial point on which the appeal was brought, it is not necessary that I should give any opinion. At the same time, so far as I have heard the arguments, which were not brought to a conclusion, and considering the case of *Thorpe v. Holdsworth* (1), it appears to me doubtful

(1) 3 Ch. D., 637.

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whether a defendant can be held to admit what the plaintiff has not stated, when he has specifically denied all that the plaintiff has stated.

Solicitors: *R. Charles; Rickards, Walker & Maude*, agents for J. Prior, Wolverhampton.

[10 Chancery Division, 398.]

C.A., Nov. 21, 28, 1878.

398] **Ex parte M'HATTIE. In re WOOD.*

Bill of Sale—Registration—Residence of Grantor—Misdescription—Bills of Sale Act, 1854 (17 & 18 Vict. 36), ss. 1, 3.

A farmer, whose real name was Joseph Wood, but who had assumed the name of Joseph Albert Wood, and had become known to his creditors by that name, executed a bill of sale in which he was described as "Joseph Wood, of Lache Hall Farm, in the county of Chester, farmer." The same name and description were given in the affidavit filed on the registration of the bill of sale. Lache Hall Farm was situate a short distance outside Chester, but was really within the county of the city of Chester, not in the county of Chester. It did not appear that there was any other farm of the same name in the county of Chester:

Held, by the Chief Judge and by the Court of Appeal, that the registration was valid.

Hewer v. Cox (1) followed.

Murray v. Mackenzie (2) distinguished.

JOSEPH WOOD was a farmer, and he resided at Lache Hall Farm, near Chester. The farm was (with the exception of a small portion of it) situate within the limits of the county of the city of Chester, and comprised about 300 acres. Wood, whose baptismal christian name was "Joseph" simply had assumed the additional name "Albert," calling himself Joseph Albert Wood. He took the lease of his farm, and transacted business in that name. The reason he gave for so doing was that a brother of his wife, whose name was also Joseph, had come to live in his house, and that he assumed the name of Albert to avoid confusion, and was constantly called by that name in his own family.

On the 14th of August, 1876, a deed was executed between Joseph Wood (called by that name only), and described as "of Lache Hall Farm, in the county of Chester, farmer," of the first part, Lucy Wood, his wife, of the second part, and F. T. Hall, of the third part. This deed contained recitals to the effect that Lucy Wood had, out of property settled to her separate use, made from time to time advances to her husband amounting to £1,800, upon an agreement that he would on demand give her security for the same, and that

(1) 8 E. & E., 428.

(2) Law Rep., 10 C. P., 625; 14 Eng. R., 469.

she had applied to him to execute a legal *mortgage [399 to F. T. Hall as a trustee for her, for the purpose of securing the £1,800 in pursuance of the agreement. And it was witnessed that Joseph Wood did thereby assign to Hall, his executors, administrators, and assigns, all the crops then growing, or which should at any time thereafter during the continuance of the security be growing, "in or upon a certain farm called Lache Hall Farm, situate in the borough of Chester in the county of Chester, and now in the occupation of the said Joseph Wood," and also all his farming, live and dead stock, household furniture, and other effects "upon the said farm or the mansion known as Lache Hall Farm, aforesaid," to hold the same to Hall, his executors, administrators, and assigns, subject to the proviso for redemption thereafter contained. This deed was registered as a bill of sale on the 31st of August, 1876. The affidavit of its execution, made by the attesting witness, and filed with a copy of the bill of sale, stated that "I was present and did see Joseph Wood and Lucy Wood in the said bill of sale mentioned, and whose names are signed thereto, sign and execute the same on the said 14th day of August, and that the said Joseph Wood resides at Lache Hall Farm, in the county of Chester, and is a farmer."

In February, 1878, Wood was adjudicated a bankrupt in the Chester County Court as "Joseph Wood, commonly called Joseph Albert Wood, Chester, farmer." Upon the application of the trustee the judge made an order declaring the bill of sale void as against him, mainly on the ground that Wood was insufficiently described in the deed and in the affidavit.

Among other evidence in support of the trustee's application, a creditor named William Garnett made an affidavit in which he said that he regularly took in *Stubb's Weekly Gazette*, and that in September, 1876, he observed an entry in it of the 6th of that month, to the effect that on the 14th of August, 1876, a bill of sale had been executed for £1,800 by Joseph Wood to Frederic Hall. In this entry Wood was described as of Lacke Hall, Cheshire, farmer. Garnett went on to say: "I did not then or since, until after the commencement of the liquidation proceedings" (instituted by Wood on the 30th of November, 1877), "identify the giver of such bill of sale with the above mentioned Joseph Albert Wood, whom I had always known as Joseph Albert Wood, and *residing at Lache Hall, in the county of the [400 city of Chester." And he said that, after observing the entry, he supplied Wood with goods on credit, which he

should not have done if he had known or suspected that he was the person referred to in the entry. There was no evidence to show that there was any other Lache Hall Farm in the county of Chester.

Hall appealed to the Chief Judge. The appeal was heard on the 22d of July, 1878.

De Gex, Q.C., and *W. H. Clay*, for the appellant, referred to *Jones v. Harris* ('); *Ex parte Mackenzie* ('); *Foulger v. Taylor* ('); *Halkett v. Emmott* ('); *Hewer v. Cox* ('); *Briggs v. Boss* (').

Winslow, Q.C., and *F. Marshall*, for the trustee, referred to *Gardnor v. Shaw* ('); *Adams v. Graham* ('); *Murray v. Mackenzie* ('); *Ex parte Hooman* ('); *Larchin v. North Western Deposit Bank* (').

BACON, C.J.: The appellant claiming under the bill of sale, it is alleged on behalf of the respondent that the bill of sale is, under the statute, void; for that it, or the affidavit in connection with it, does not contain a statement of the particulars which the statute requires. Now the statute is as plain as can be. The statute requires that there shall be an affidavit made containing "a description of the residence and occupation of the person making or giving the same." That is all I need read; and the first question is, whether that statute has been complied with. I am furnished with an affidavit which is said to be insufficient, not because there is any fault in the jurat or anything of that kind, but because it does not describe the maker of the bill of sale accurately; for that in the bill of sale the name is Joseph Wood instead of Joseph Albert Wood. But the first observation upon 401] that is that the statute *does not require that the name should be stated at all. I would not, of course, be understood to say that that would be so where the name does not sufficiently appear in the transaction; but in the courts of law, where these questions have been more frequently brought forward than anywhere else, it has been decided that in order to weigh and test the sufficiency of the affidavit, you may look at the bill of sale itself, and if upon reading the bill of sale you find the residence and occupation of the maker properly described, that, according to the strict words of the statute, will be enough. But, besides

(1) Law Rep., 7 Q. B., 157.

(2) 42 L. J. (Bkey.), 25.

(3) 1 L. T. (N.S.), 57.

(4) 47 L. J. (Q.B.), 436.

(5) 3 E. & E., 428.

(6) Law Rep., 3 Q. B., 268.

(7) 24 L. T. (N.S.), 319.

(8) 33 L. J. (Q.B.), 71.

(9) Law Rep., 10 C. P., 625; 14 Eng. R., 469.

(10) Law Rep., 10 Eq., 623.

(11) Law Rep., 10 Ex., 64; 12 Eng. R., 524.

that, if you look at this affidavit you cannot fail to see what the deponent—that is to say, the witness upon whose statement the registration takes place—means, for he says in effect: “I saw Joseph Wood, the party to this bill of sale, execute this bill of sale;” so that the thing, as made, has a certain identity given to it, putting it out of all possibility of question.

Then several cases have been referred to, none of which, in my opinion, touch this case. I am reminded, however, that in one of the cases two of the learned judges—certainly not the least learned of the judges before whom these cases have come—expressed the opinion that technicality in these matters has been carried too far, and that the policy of the statute is to be regarded only, and that, if there is no infraction of the statute, enough is done. That has been held by Mr. Justice Mellor and Mr. Justice Lush, both judges who are greatly conversant with matters of practice, as well as with matters of law. Then it is said the defect consists in this—that Joseph Wood had assumed the name of Joseph Albert Wood. I find nothing in the evidence to satisfy me when he assumed the name Albert. It may have been, for aught I can tell, as well after the execution of the bill of sale as at any other time. There is an affidavit made by a Mr. Garnett upon this subject which is relied on by the respondent. Garnett seems to be a tradesman in the city of Chester. But the precise time at which he consulted *Stubbs' Gazette* does not appear, and he says, “I did not then”—whenever that was—“or since, until after the commencement of the liquidation proceedings, identify the giver of such bill of sale with Joseph Albert Wood, whom I had always known as Joseph Albert Wood, residing at Lache *Hall Farm, in the county of the city of Chester,” [402 and it is, upon that, suggested that the description in the bill of sale is inaccurate. It is not suggested that the bankrupt made any misrepresentation to anybody, or that if Mr. Garnett had found him registered by the name of Joseph Albert Wood, he would not have trusted him if he had thought he was this Joseph Albert Wood, a farmer of 300 acres, because the particular locality was said to be within the county and not within the county of the city of Chester. I think the description “in the county of Chester” is a perfectly sufficient and accurate description.

The case of *Hever v. Cox* (') goes a great deal beyond that, but where there is an accurate description not calcu-

(') 3 E. & E., 428.

lated to mislead, and not having misled anybody, I think I should violate the act of Parliament, instead of putting it in force, if I were to attend to such suggestions as are made here by Mr. Garnett. I consider that nobody looking at *Stubbs' Gazette* could have doubted that the Joseph Wood whose execution of this bill of sale has been proved in a proper manner was anybody else than the same Joseph Albert Wood; and, in my opinion, the objections which have been taken to the bill of sale altogether fail.

Mr. Winslow, who is never at a loss for suggestions and illustrations for which I am always very much obliged to him, suggests the case of a man changing his name under suspicious circumstances,—of Smith changing his name to Brown; but if such a change of name took place honestly, in my opinion it would not invalidate a bill of sale. If a man who had been dealing with Smith in London, found him living at Chester, asked to be paid, and got a bill of sale from him, and then it turned out that Smith, having fled from his creditors in London, had taken the name of Brown, could that fact be held to invalidate the creditor's bill of sale? If it were a case of fraud, undoubtedly the court would act, because the court never loses the power of unravelling cases of fraud; but in my opinion a bill of sale executed honestly in that way would be as good as if executed in the name of Smith, and perhaps better.

I am of opinion that this bill of sale was properly executed and duly registered.

403] *The order appealed from cannot be sustained; but it was very proper that the matter should be thoroughly inquired into, and the costs both here and below will be ordered to come out of the estate.

From this decision the trustee appealed. The appeal was heard on the 21st and 28th of November, 1878.

Winslow, Q.C., and *F. Marshall*, for the appellant: The description of the grantor in the bill of sale and in the affidavit is insufficient. He ought to have been described by the name of Joseph Albert Wood, by which he was known to his creditors; and the description of the farm as situate in the county of Chester, instead of in the county of the city of Chester, is entirely erroneous and misleading: *Larchin v. North Western Deposit Bank* (¹); *Gardnor v. Shaw* (²); *Rex v. Billingshurst* (³); *Murray v. Macken-*

(¹) Law Rep., 10 Ex., 64; 12 Eng. R., 524.

(²) 24 L. T. (N.S.), 319.

(³) 3 M. & S., 250.

zie⁽¹⁾. In *Larchin v. North Western Deposit Bank*⁽²⁾, Blackburn, J., said that the object of the act is "to enable one who is asked to give him (the grantor) credit to know at once, by looking at the register, whether the person he is asked to give credit to has executed a bill of sale." *Jones v. Harris*⁽³⁾ and *Hewer v. Cox*⁽⁴⁾ do not apply.

De Gex, Q.C., and *W. H. Clay*, for the respondent, were not heard.

JAMES, L.J.: Upon the question whether there is any defect in the registration, after looking at the bill of sale and at the affidavit, I really have no doubt whatever. First of all it is said that there is a distinction between Joseph Wood, the name used in the security and in the registration, and Joseph Albert Wood, the name by which the grantor was known in the district in which he lived. But the act says nothing about the name of the grantor, and the truth is that scarcely anybody ever dreams of looking at *the christian name of a person for whom he is [404 searching in the register. The thing which a creditor would look for in this case would be the name of Wood. There is probably hardly any one in Chester or in the county of the city of Chester who, knowing Mr. Wood of Lache Hall Farm, and coming to look at the register for the purpose of inquiring about his circumstances, with reference to his credit, or with the view of lending money to him, would have any hesitation in concluding that Mr. Wood of Lache Hall Farm was the Mr. Wood with whom he had been dealing, or was about to deal. Then, as to the description "Lache Hall Farm in the county of Chester," Lache Hall Farm is a very distinctive and peculiar designation. Lache Hall Farm is really in the county of the city of Chester, but probably very few people know the distinction between the county and the county of the city. If the question was asked, Where is Lache Hall Farm? the answer would be, in the county of Chester. Probably very few people are aware that the county of the city extends beyond the city walls and includes an enclave in the county of Chester. I think this is sufficient to show that there has not been such an inaccuracy in using the words "the county of Chester" instead of "the county of the city of Chester" as was calculated to mislead any one, or as did in fact mislead any one. One creditor, named Garnett, does indeed say that he was misled by an entry which he saw in *Stubbs' Weekly Gazette*.

⁽¹⁾ Law Rep., 10 C. P., 625; 14 Eng. R., 469.

⁽²⁾ Law Rep., 10 Ex., 65; 12 Eng. R., 525.

⁽³⁾ Law Rep., 7 Q. B., 157.

⁽⁴⁾ 3 E. & E., 428.

But there the description of the grantor's residence was different from that in the register. It was given as "Lacke Hall Farm," and of course the person making or the person accepting the bill of sale could not be in any way affected by that error. The grantor's place of residence is, I think, in substance accurately described in the register

BAGGALLAY, L.J.: I am of the same opinion. The first point raised is this, that though the bill of sale was executed by the grantor in his proper name of Joseph Wood, he was at the time carrying on his farming business, and was generally known as Joseph Albert Wood. But the Bills of Sale Act does not require that the name of the grantor should be given otherwise than by giving his real name. It is quite possible that, if a man was carrying on business in a name 405] different *from his real name, that might be an element of fraud to be taken into consideration quite independently of the requirements of the Bills of Sale Act. Then, as to the second point, the act requires that a description of the residence and occupation of the person giving the bill of sale shall be registered. I think that two of the cases which have been referred to on behalf of the appellant very well illustrate what is meant by a description of the residence and occupation. In *Murray v. Mackenzie* (*) Mr. Justice Lindley, following the other three judges in giving his decision, states concisely the same principle as had been enunciated by them at greater length, when he says, "The statute is imperative. If the bill of sale is filed without a substantially strict compliance with its requirements, it is to be null and void." In *Jones v. Harris* (†) Lord Chief Justice Cockburn says: "The act does not specify to what extent of particularity the description of the residence must be carried. We have, therefore, to put a construction upon the meaning of the word 'residence,' and I think that what is meant and intended thereby is a reasonably sufficient description of a residence, which would guide the inquiries of a person who may be interested in knowing whether the individual about whom he desires to inquire, and to whom he is about either to advance money or to supply goods on credit, or whom he proposes to otherwise trust, has made any disposition of property by way of a bill of sale. In fact, to enable the party to make such investigations as would be necessary for his protection before he either advanced money or supplied goods on credit."

In *Jones v. Harris* the Court of Queen's Bench considered

(*) Law Rep., 10 C. P., 625, 629; 14 Eng. R., 469, 473.

(†) Law Rep., 7 Q. B., 157, 160.

that the deficiency of the description in the affidavit might be supplied by a reference to the bill of sale. The affidavit had simply described the giver of the bill of sale as residing at Dynevor Lodge, but the bill of sale described him as of Dynevor Lodge, in the parish of Llanarthney, in the county of Carmarthen. The deficiency of the description in the affidavit was allowed to be supplied by the fuller description in the bill of sale. In *Murray v. Mackenzie* the state of things was very different. There were, I think, two positive misdescriptions, the fact being this, *that [406 whereas the debtor resided at No. 37 Malpas Road, he was described in the affidavit as residing at No. 73 Malpas Road, and that whereas the attesting witness was described in the attestation to the bill of sale as of No. 2 South Terrace, Hatcham Park, his actual residence was at No. 3. This might very possibly mislead any person who was inquiring into the circumstances under which the bill of sale was given. In the present case I think we have one very similar to *Hewer v. Cox* (¹), where the makers of the bill of sale were described in it and in the affidavit as residing at New Street, Blackfriars, in the county of Middlesex. They did carry on business in New Street, Blackfriars, which, though it is within the county of Middlesex, is properly described as in the city of London. That was held not to be a misdescription. Here a man is described as living at Lache Hall Farm, not as in the county of the city of Chester, which would have been strictly accurate, but as in the county of Chester. Was that likely to mislead a person making inquiry to satisfy himself whether he should trust this man or not? I think not, but that there has been what Mr. Justice Lindley called a substantially strict compliance with the requirements of the act.

THE SINGER, L.J.: I concur with what has fallen from the other members of the court. There is nothing in the act which necessitates the name of the grantor being correctly given, that is, in regard to the validity of the registration. Sect. 1, which speaks of what is to be included in the affidavit which is to accompany the filing of the bill of sale, does not mention the name of the grantor at all. And, although it is true that in sect. 3, "the name, addition, and description of the person making or giving" the bill of sale are included in that which is to be entered by the officer of the court, that section does not relate to the matters which are to validate or invalidate the bill of sale, but relates solely to the duties of the officer of the department in which

(¹) 3 E. & E., 428.

the bill of sale is to be filed, and constitutes only a direction to him as to the entries which are to be made.

Well then, that being so, the whole question resolves itself 407] into *this, whether there has been a sufficient description of the residence of the person making the bill of sale. In *Hewer v. Cox* (¹), to which reference has been made, Mr. Justice Wightman says (¹): "The object of the Legislature was to afford creditors facilities for discovering whether any of the persons with whom they deal has made a bill of sale; and, in order to effect this object, it requires such a description of the residence and occupation of the person making or giving such a bill to be filed as shall enable that person's creditors to identify him and take precautions accordingly." It does not require that the description of the residence shall be absolutely accurate, but it does require that there shall be such a description as will enable possible future creditors to identify the maker of the bill of sale. Now, in *Hewer v. Cox*, as has been pointed out by Lord Justice Baggallay, the circumstances were very similar to those of the present case. There was a proper description of the residence, there was an improper description of the county in which that residence was situated; and it seems to me that, the court having there decided that that was not sufficient to invalidate the bill of sale, the present case is an *a fortiori* one, and for this reason, that in a popular sense Lache Hall Farm may be said to be in the county of Chester. It is true that, owing to the old boundaries between the county of the city and the county proper, a residence, which is situate two miles outside the walls of Chester, is strictly and legally speaking within the county of the city and not within the county of Chester proper. But, popularly speaking, I venture to think that, for one person who would know that Lache Hall Farm was within the county of the city of Chester, there would be ten who would suppose that it was within the county of Chester. Under these circumstances *Hewer v. Cox* seems to be in point, and though the debtor made an addition to his christian name when he came to Lache Hall Farm, that does not seem to me to be sufficient to mislead the creditors. I think that as he was described as Joseph Wood, which was his real name, and his residence was described by a name which does not appear to belong to any other place in the county, all creditors or intending creditors had a sufficient identification of the man and of his residence to enable them to see whether the per-

(¹) 3 E. & E., 428.

(²) 3 E. & E., 438.

son they *were going to trust had received advances [408
on the security of a bill of sale.

Appeal dismissed with costs.

Solicitors for appellant: *Chester & Co.*, agents for Walker
& Smith, Chester.

Solicitors for respondent: *Denton, Hall & Barker.*

[10 Chancery Division, 408.]

C.J.B., Aug. 3: C.A., Nov. 28; Dec. 5, 1878.

Ex parte NATIONAL GUARDIAN ASSURANCE COMPANY.

In re FRANCIS.

Bill of Sale—Construction—Power to Grantee to take Possession on happening of any one of certain Events—Subsequent Proviso that Grantor shall retain Possession until Default in Payment—Reputed Ownership—Order and Disposition—Friendly Possession—Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), s. 15.

A bill of sale of chattels empowered the grantee to take possession in case (*inter alia*) the grantor should become embarrassed in his affairs, or in case any action at law should be commenced against him. There was a subsequent proviso that, until default should be made in payment, according to the covenant and proviso therein contained, it should be lawful for the grantor to retain possession:

Held, by the Court of Appeal (reversing the decision of Bacon, C.J.), that the prior clause was not controlled by the subsequent proviso, but that on the happening of one of the specified events, the grantee was entitled to take possession, though no default in payment had been made by the grantor.

In order to exclude the operation of the reputed ownership clause, a real possession, even though it be friendly, is sufficient.

But, to satisfy the Bills of Sale Act, the possession must be apparent as well as real.

G. D. FRANCIS was the lessee of the Theatre Royal, Newcastle-on-Tyne, and of the Theatre Royal, Glasgow. He resided at Newcastle. On the 20th of August, 1877, he, in consideration of an advance of £600, executed a bill of sale of his goods and chattels in his dwelling house to the National Guardian Assurance Company, to secure the payment to them of £680 in three equal instalments, on the 16th of January, the 16th of April, and the 16th of July, 1878. The deed contained a covenant by the *borrower [409 to pay the instalments on the days appointed, and that in case default should be made in payment of either of them on the days appointed, the whole of the remaining instalments should become payable immediately. And the borrower thereby assigned the goods, and all his right and property therein, to the company "as their own proper chattels and effects." Provided nevertheless that, in case the borrower should pay to the company the £680 by the instalments and according to the covenant thereinbefore contained, and

should observe and perform all other his covenants and agreements therein contained, then the deed should cease and determine. And the borrower did thereby declare that "after default shall be made in payment according to the covenant hereinbefore contained, or on breach of any covenant of the borrower herein contained, and after written demand for payment shall have been given to or left for him at his last known place of business or abode, sealed by the company, or signed by any person on their behalf, or in case he shall die or be or become bankrupt, or compound or attempt to compound with his creditors, or become embarrassed in his affairs, or in case any action at law, or any other legal process shall be commenced against the borrower, or in case any distress or writ of execution shall be issued or levied, or attempted to be levied, upon the said effects or any part thereof then and on either of the said cases happening" it should be lawful for the company to take possession of the goods and to sell them, and out of the proceeds of sale to retain their costs and what should be due to them, and to deliver the surplus (if any) to the borrower. And there was a further proviso that, "until default be made in payment according to the covenant and proviso herein contained, it shall be lawful for the borrower to hold, make use of, and possess the said goods, chattels, and effects," without any hindrance or disturbance by the company. The bill of sale was duly registered. The first instalment of the £680 was paid when it became due. On the 26th of February, 1878, Mr. Bourne, the manager of the company, having received information that Francis was in embarrassed circumstances, instructed an auctioneer at Newcastle to take possession of the goods, and on the 5th of March a man was put in possession. No demand for payment was made before possession was taken. At this 410] time several actions had been commenced against Francis, and an execution had been levied on his goods in the theatre at Newcastle. On the 7th of March he filed a liquidation petition in the county court at Newcastle. The goods were afterwards sold, and the trustee in the liquidation claimed the proceeds of sale. Francis deposed that at the time when the company took possession he was not embarrassed in his circumstances, and that, had any demand been made upon him, and a reasonable time allowed, he could without any difficulty have made arrangements to pay any sum that might have been demanded by the company in respect of any claim by them against him. And, with regard to the nature of the possession taken, Francis

deposed that it consisted in a man being left in the house, who remained in the back premises, Francis and his family continuing to occupy the house and use the furniture in the same way as they had previously done without any interruption. Charles Brough, the man who was put in possession, deposed, "The possession, I considered, was a friendly one, Mr. Francis and his family being allowed to continue using the furniture as before." And in a letter written on the 2d of March by a Mr. Egerton, who was acting on behalf of Francis, to Mr. Bourne, he said, "I think in Mr. Francis' own interest you should not delay being in possession." And Mr. Bourne deposed that "Mr. Francis concurred in our taking possession." The judge of the county court held that the trustee was entitled to the money, on the ground that the bill of sale did not authorize the taking of possession unless a written demand for payment was first made by the company. The company appealed to the Chief Judge. The appeal was heard on the 3d of August, 1878.

E. C. Willis, for the appellant.

Winslow, Q.C., and *Creed*, for the trustee.

BACON, C.J.: The bill of sale contemplates a variety of events in which it may be the right of the bill of sale holders to take possession. They lent a sum of money payable by instalments, and it provides that, if default shall be made in payment after demand, there shall *be a [411] right to enter; and it gives them a right to take possession in certain other cases. Now, that there was no demand made before possession was taken is a fact about which there is no question. There was no demand made, and, indeed, no money was due. The only question is as to the lawfulness of the possession, and whether any of the other events which entitled them to take possession had happened. Mr. Bourne's evidence is to the effect that from information which reached him, no matter from what source or at what time, he bethought himself that his security was in danger, and he went down to the place where the property was, and there employed an auctioneer to take possession. Unless there was default made in payment, unless the instrument authorized him to take possession, he had no right to do so, because the stipulation is that the borrower shall be in undisturbed possession unless he makes default in payment. The deed also provides that the company may enter in case he becomes bankrupt, or upon the happening of other events. But where is the evidence that any of these things had happened? It is said that the debtor was in a state of embarrassment, but that is a very

wide expression. Is a man necessarily embarrassed because actions are brought against him? Those actions may or may not have been rightly brought. I will assume that they were rightly brought, and that he had not the money in his pocket at that time. But that is not being in embarrassed circumstances, because he might have elsewhere a sum quite sufficient to cover the amount for which the actions were brought. But that is the only account that we have heard of his embarrassments—that somebody had heard that there were four actions brought against him. That may have been quite true, but I cannot turn a deaf ear to the evidence—which is uncontradicted—of Francis himself, that he was perfectly able to pay all his debts. He had these actions brought against him, but they did not embarrass him, because he had assets of various kinds, by means of which he could pay his debts. There are many people who neglect to pay their debts, but that does not necessarily imply that they are in embarrassed circumstances. The deed gives no authority to take possession of the goods of a man who, having borrowed £680, had repaid the first instalment, and who would probably have repaid 412] the second but *for the conduct of the somewhat officious manager of the bank, who goes down and of his own free will takes possession. And then how does he take possession? He puts a man in friendly possession; the debtor is not turned out of his house; no one exercises any authority over the goods, and the man and his wife and children remain in the house; but there is a blind possession, a friendly formal possession on behalf of the company. I cannot say that the possession was lawful; it was not justified by the bill of sale, or by any of the circumstances. Nor was it a sufficient possession, which could deprive the trustee of his title to the goods. I think that the order of the county court was right.

From this decision the company appealed. The appeal was heard on the 28th of November and the 5th of December, 1878.

De Gex, Q.C., and *E. C. Willis*, for the appellants: The taking possession was justified by the terms of the deed. The evidence shows that actions had been commenced against Francis before possession was taken. The possession taken was sufficient to satisfy the reputed ownership clause; for that purpose *de facto* possession is enough, for it puts an end to the consent of the true owner of the goods. Even an unsuccessful attempt to obtain possession would do. It

is not necessary that the possession should be apparent, as under the Bills of Sale Act.

Winslow, Q.C., and Creed, for the trustee: According to the true construction of the bill of sale the right to take possession did not arise until default had been made in payment of one of the instalments. Nothing was due on the 5th of March. Even when mortgage money is made payable on demand it has been held in many cases that a reasonable time must be given to the mortgagor to find the money. The possession taken was a merely friendly or colorable possession, which is not sufficient: *Jackson v. Irvin* ⁽¹⁾; *Vicarino v. Hollingsworth* ⁽²⁾. The invitation was to take possession in the interest of Francis; such a transaction cannot be supported: *Ex parte Arnold* ⁽³⁾.

*JAMES, L.J.: The question depends entirely on [413 the construction of the deed, and I find it impossible to arrive at the same conclusion as the Chief Judge. He appears to have assumed that the proviso at the end overrides the previous clause, and that therefore the possession taken by the appellants was unlawful. I think the real effect of the deed, taking it altogether, is this: The mortgagees became the legal owners of the goods, and as such would have the right to take possession of them. Then there is a proviso in the usual form that the mortgagor shall be entitled to retain possession until default be made by him in payment according to the covenant and proviso contained in the deed. That is to say, the mortgagor had a kind of term in the goods granted to him by way of a charge upon the absolute ownership of the mortgagees. But in the same deed there is an express provision enabling the mortgagees, on the happening of a number of different contingencies, to take possession of the goods and to sell them. It is impossible to conceive that this express provision was intended to be entirely abrogated by the subsequent authority to the borrower to hold possession except in one contingency. There is no magic in the position of the clauses in the deed; every clause is part and parcel of the bargain between the parties. Did, then, any of the things happen which entitled the mortgagees to take possession? There can be no doubt that one of them did. The borrower was "embarrassed in his affairs;" there could not be better evidence of that than the fact that an execution had been levied in his theatre, which was his principal means of getting his living. The manager of the company was informed that he was embarrassed, and the information on which he acted turns out to have been

(1) 2 Camp., 48.

(2) 20 L. T. (N.S.), 362.

(3) 3 Ch. D., 70.

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true. He was justified, therefore, in taking possession. It is said, however, that the possession taken was not a hostile but a friendly possession. That is often the case. Under the Bills of Sale Act the possession must not be colorable, but under the reputed ownership clause it is quite a different matter. The only question is whether possession was taken by the true owner of the goods with the intention of asserting his rights. In the present case, whatever were the motives of kindness of the company's manager towards the [414] debtor, it is clear *that his object was to get the goods out of the debtor's order and disposition, so as to avoid the effect of his bankruptcy, which was then imminent. He had heard that the debtor was embarrassed, and he completed his title by taking absolute possession of the goods. It was not a sham but a real possession, taken for the purpose of giving effect to the security of the company. The order of the Chief Judge must be reversed.

BAGGALLAY, L.J.: The case of the respondent is based on two grounds. It is said, first, that there was no right to take possession at all; and, secondly, that the possession was a friendly one. No doubt the right to take possession must be exercised according to the terms of the deed. But here we have the circumstance, not only that actions at law had been commenced against Francis, but that the fact of these actions having been commenced gave the right to the company to take possession; and this apart from any question of embarrassment. The proviso at the end of the deed must be read in connection with the rest of the deed, and not so as to make three fourths of the previous provisions ineffectual. The question of the nature of the possession seems hardly to have been fully considered by the Chief Judge. I entirely concur with the Lord Justice, and I can see no ground for saying that the possession was not such as is ordinarily taken by a bill of sale holder in the exercise of his rights.

THESIGER, L.J.: I am of the same opinion. When the whole of the bill of sale is looked at there can be no reasonable doubt as to its meaning. There is a distinct provision that, in the event of the debtor becoming embarrassed, or of actions being commenced against him, the mortgagees shall be entitled to take possession. It is said that this is subject to the condition that there must have been a previous written demand for payment. But it is clear that that condition only refers to the previous words, "default in payment according to the covenant hereinbefore contained, or on breach of any covenant of the borrower herein con-

tained." Then it is said that the power to take possession is controlled by the subsequent *proviso that the [415 debtor shall be left in possession until default shall be made in payment. It would, I think, be running counter to all rules of construction to hold that this general proviso is to override the prior special one. On the construction of the deed, I have no doubt that the power to take possession arose on the debtor's becoming embarrassed in his circumstances, or on the happening of any of the other events mentioned. Then it is said that a sufficient possession was not taken, and that we ought to look at the motives which actuated the company's manager. I agree that we may do this, not for the purpose of altering the character of the possession taken, but in order to arrive at the conclusion whether the possession was a real one or a mere sham. But, as soon as we arrive at the conclusion that the possession was real, the motives with which it was taken are immaterial. Here there is abundant evidence of a real possession. The debtor had, as in *Vicarino v. Hollingsworth* (1), the use of the goods, but it was subject to the control of the man who was put into possession, and who was there to see that the use was in accordance with the rights of the bill of sale holders. If we were to hold that this was not a sufficient possession, we should be confusing the possession which is necessary with reference to the question of order and disposition with that which is required under the Bills of Sale Act, and which must be apparent as well as real.

Solicitor for appellants: *A. D. Michael.*

Solicitor for trustee: *G. B. Wheeler*, agent for D. E. Stanford, Newcastle-on-Tyne.

(1) 20 L. T. (N.S.), 362.

See 23 Eng. Rep., 496 note.

As to rights of pledgor and pledgee of chattels, choses in action, etc., and as to right of pledgee to buy at his own sale, see *Union, etc., v. Rigdon*, 93 Ill., 458; *Killian v. Hoffman*, 6 Bradwell (Ills.), 200; *Choukau v. Allen*, 70 Mo., 290.

As to when an instrument is a pledge and not a mortgage: *Wilson v. Knapp*, 70 N. Y., 596.

The payment of a debt secured by a mortgage of personal chattels, operates as a satisfaction of the mortgage, and extinguishes the title conveyed by the mortgage: *Shiver v. Johnston*, 62 Ala., 87.

Where, in an action by the mortgagee against the mortgagor to recover the mortgaged property, it is shown that the note secured by the mortgage was given for money loaned at usurious interest, and the mortgagor has paid or tendered to pay the principal, and brings the money into court, a charge that if the jury believe these facts, plaintiff was entitled to recover only the costs of the suit, contains no error prejudicial to the plaintiff, and furnishes no ground for reversal on appeal by him: *Shiver v. Johnston*, 62 Ala., 87.

Where the mortgagee of chattels takes possession after condition broken,

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the mortgagor, who has subsequently tendered the sum due on the mortgage, but has not kept the tender good by paying the money into court, cannot maintain replevin for the property: *Smith v. Phillips*, 47 Wisc., 202.

The equity of redemption of property covered by a chattel mortgage is subject to execution, and therefore the mortgagee cannot replevy the same from an officer who, while they are in possession of the mortgagor pursuant to the terms of the mortgage, has levied on them for sale on an execution against the mortgagor: *Olds v. Andrews*, 66 Ind., 147.

Where the mortgagee took possession of the mortgaged property before he had any right by its terms to do so, and the mortgagor sued him for seizing and selling the goods without his consent before default; held, that the plaintiff was entitled to recover, on the ground that he was entitled to the restitution of his property on the performance of the condition on which he mortgaged it, which the mortgagee, by his wrongful act, had prevented from being accomplished: *Bingham v. Bettinson*, 30 U. C. C. Pl., 438.

Goods and chattels on which there is a chattel mortgage may, nevertheless, be sold on execution, on a judgment against the mortgagor, but the rights of the mortgagee will not be affected thereby unless he has done something to estop him from asserting his rights. When such sale is made on execution, the mortgagor may assert his right to the goods, by replevin, against the purchaser. In such case the purchaser under execution cannot, by answer, demand that the assets shall be marshaled if the necessary parties are not before the court: *Kelly v. Purcell*, 8 Am. Law Record, 705, District Court Logan County, Ohio.

Where a chattel mortgage provides for the possession of the property to

remain with the mortgagor for a specified time, and contains a clause that if any writ from any court shall be levied upon the same, the debt shall become due, and the mortgagee may elect to take possession of the property and sell, etc., the mortgagee may maintain replevin or trover for the property after demand for its possession from a party levying upon the same, and refusal to surrender it: *Quinn v. Schmidt*, 91 Ills., 84.

A mortgagee of chattels in possession, under his mortgage, is not entitled to an injunction against the marshal, restraining him from levying upon and selling such chattels under an execution against the mortgagor. In such case the mortgagee has an adequate remedy at law, and equity should not interfere: *La Mothe v. Fink*, 12 Chicago Leg. News, 152, U. S. Circuit Ct., E. D. Wisc., Dyer, J.

See however *Husted v. Ingraham*, 75 N. Y., 252.

The mortgagee, from whom chattels have been wrongfully replevied by the mortgagor, is entitled to judgment for their return, with any damages suffered from the taking, or for the amount of the mortgage debt; but cannot have judgment for the full value of the property, if that exceeds the mortgage debt and costs: *Smith v. Phillips*, 47 Wisc., 202.

One not having a judgment and execution, is not a creditor within the meaning of the provisions of the statute (Laws 1833, ch. 279, § 1), declaring that the omission to file a chattel mortgage renders it void as against creditors of the mortgagee, and subsequent creditors or mortgagees in good faith.

Nor is a person a mortgagee in good faith, within the meaning of said statute, whose mortgage was given for a pre-existing indebtedness, without any new consideration: *Jones v. Graham*, 77 N. Y., 628.

[10 Chancery Division, 416.]

C.A., Dec. 18, 1878.

*WADDELL V. BLOCKEY.

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[1877 W. 356.]

Practice—Appeal—Security for Costs—Pauper—Special Circumstances—Abandoned Motion—Motion for New Trial—Rules of Court, 1875, Order XL, r. 10.

A defendant in an action which had been tried by a judge without a jury gave notice of appeal against the judgment, and also obtained *ex parte* a rule *nisi* for a new trial. He did not set down the appeal for hearing, but, before the argument of the rule for a new trial, gave fresh notice of appeal from the judgment. There was a substantial question to be tried as to the measure of damages. The appellant being in insolvent circumstances, the plaintiff moved for security for costs:

Held, first, that the plaintiff was entitled to the costs of the first notice of appeal as an abandoned motion:

Secondly, that the second notice of appeal was unnecessary, inasmuch as the whole question could be tried under Rules of Court, 1875, Order XL, rule 10, upon the application to make the rule for a new trial absolute; and the appellant was therefore ordered to give security for costs.

[10 Chancery Division, 420.]

C.A., Dec. 6, 18, 1878.

*KREHL V. BURRELL (¹).

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[1878 K. 30.]

Appeal from Finding of Fact—Interlocutory Order—Time for appealing—Order XXXIX, r. 1a.

An action for an injunction to restrain the defendant from building so as to interfere with a right of way claimed by the plaintiff, which right was disputed, came on for trial before the Master of the Rolls, with witnesses, no issues of fact having been directed. After the examination had been concluded, the Master of the Rolls stated that he found a verdict for the plaintiff as to the right of way, and directed the action to stand over in order to give the parties an opportunity of coming to an arrangement. Upon the action coming on again, a mandatory injunction was granted; the order reciting that the court had found the plaintiff entitled to the right of way. The defendant, after the expiration of twenty-one days from the time when the verdict had been given, appealed from the order:

Held, that the finding that the plaintiff was entitled to the right of way could not now be questioned, for that the defendant ought to have moved the Court of Appeal for a new trial within twenty-one days from the verdict being given.

Order XXXIX, rule 1a of the Rules of Court, 1875, does not apply to trials before a judge of the Chancery Division, but where a judge of that division has definitely found a verdict on a matter of fact, such verdict is equivalent to an interlocutory order, which can only be appealed from within twenty-one days.

(¹) See case on merits, 23 Eng. Rep., 703.



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1. Where accounts are impeached and it is shown that they contain errors of considerable extent both in number and amount, whether caused by mistake or fraud, the court will order such accounts, though extending over a long period of years, to be opened, and will not merely give liberty to surcharge and falsify; and supposing a fiduciary relation to exist between the parties, the court will make a similar order if such accounts are shown to contain a less number of errors, or if they contain any fraudulent entries.
2. *Seemle*, in an action between principals and agents impeaching the agents' accounts, actual knowledge of antecedent fraud in the agents by one who subsequently became a member of the firm of the principals would not, if proved, be any bar to their claim. *Williamson v. Barbour.* 809
3. Where an account is impeached, if a single important error is established, the court will not, except in the case of fraud, order the whole account to

be opened, but will make a decree that the plaintiff may be at liberty to surcharge and falsify.

4. In a partnership action, where one error of £950 was established in an account long settled:

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property to trustees to divide amongst his six children equally, and directed that the sums of money advanced to them in his lifetime should be brought into hotchpot. He advanced to his two sons in and subsequent to 1869 several sums of money, and in 1878 he wrote a letter to each of them, stating that if he would give him a promissory note for the sum mentioned he would write off the balance:

Held, that, regardless of the letters, the sons must bring the whole of the sums advanced to them into hotchpot.
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1. On the 26th of June an appellant in bankruptcy was ordered to give additional security for the costs of the appeal. On the 4th of November, the security not having been given, the respondents' solicitor, without having previously written to the appellant's

solicitors, gave notice of motion to dismiss the appeal for want of prosecution. On the 13th of November the additional security was given, and on the 14th of November the motion to dismiss came on to be heard:

Held, that the appellant must pay the costs of the motion, and that the appeal could not be heard until he had done so. *Matter of Isaacs.* 450

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3. An action for an injunction to restrain the defendant from building so as to interfere with a right of way claimed by the plaintiff, which right was disputed, came on for trial before the Master of the Rolls, with witnesses, no issues of fact having been directed. After the examination had been concluded, the Master of the Rolls stated that he found a verdict for the plaintiff as to the right of way, and directed the action to stand over in order to give the parties an opportunity of coming to an arrangement. Upon the action coming on again, a mandatory injunction was granted; the order reciting that the court had found the plaintiff entitled to the right of way. The defendant, after the expiration of twenty-one days from the time when the verdict had been given, appealed from the order:

Held, that the finding that the plaintiff was entitled to the right of way could not now be questioned, for that the defendant ought to have moved the Court of Appeal for a new trial within twenty-one days from the verdict being given.

4. Order xxxix, rule 1a of the Rules of Court, 1875, does not apply to trials before a judge of the Chancery Division, but where a judge of that division has definitely found a verdict on a matter of fact, such verdict is equivalent to an interlocutory order, which can only be appealed from within twenty-one days. *Krehl v. Burrell.* 803

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1. The plaintiff through his solicitor contributed £500 and the solicitor £300 to a loan of £800 on deposit of deeds. The solicitor subsequently took a mortgage to himself for the £800. The solicitor afterwards deposited the title-deeds of the mortgaged property with a bank as security for a loan of £400:
Held, that the plaintiff had priority for his £500 over the security to the bank.

2. The plaintiff had lent money to a solicitor on the security of the deposit of title-deeds of land in Middlesex with a letter charging the land, the legal estate in which was outstanding. The solicitor afterwards, by way of security for money due to a client, made a mortgage of the land to the client, which mortgage was registered:
Held, that the client must be presumed to have had notice of the plaintiff's charge, which therefore, though unregistered, retained priority. *Bradley v. Richey*. 25

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ATTORNEYS.

1. The retainer and employment of a solicitor in such a matter as a bankruptcy, an administration, or a winding-up, does not constitute an entire contract so as to deprive the solicitor of his right to payment, except for costs out of pocket, till the whole matter is completed, and successive bills of costs in such a matter are not necessarily to be treated as one bill brought down to the date of the latest delivery.

2. Accordingly, where solicitors had been retained to act for a trustee in bankruptcy, and also to protect the interests of S., a creditor, who subsequently by arrangement with the other creditors took over the bankrupt's estate, and they delivered a bill of costs up to a certain date, with an intimation that there were then and would still be some further items, and delivered a second bill of costs incurred after the date to which the first bill came down,—on an application by S. to tax both bills, more than twelve months after the delivery of the first:

Held, that they must be treated as separate bills, and that the second bill only could be taxed. *Matter of Hall*. 318, 328 *note*.

3. A client mortgaged property, which was at the time subject to a first mortgage, to his solicitors, who prepared the mortgage deed to themselves. Afterwards the mortgagor made a third mortgage to another person:

Held, in an action by the solicitors against the first and third mortgagees and the mortgagor, that they were entitled only to their ordinary costs as mortgagees, and that they had no lien on the mortgage deed for the costs of its preparation or other costs due to them from the mortgagor. *Sheffield v. Eden*. 701

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1. The trustee in bankruptcy of a mortgagee can obtain judgment for foreclosure against the trustee in bankruptcy of the mortgagor, and is not obliged to make his application to the Court of Bankruptcy. *Waddell v. Toleman*. 55
2. Notwithstanding the provision of sect. 6 of the Bankruptcy Act, 1869, that "the debt of the petitioning creditor must be a liquidated sum due at law or in equity," the old rule in bankruptcy remains in force, that where a debt is vested in a mere trustee for an absolute beneficial owner who is capable of dealing with the debt as he pleases, the trustee cannot alone sustain a petition for adjudication of bankruptcy against the debtor, but the beneficial owner must join in the petition.
3. The rule, however, does not apply to a trustee for persons under disability. *Matter of Culley*. 131, and note.
4. When a stranger to a bankruptcy is willing to submit to the Court of Bankruptcy the determination of his rights in relation to property of the bankrupt, it is improper for the trustee in the bankruptcy to raise objections to the exercise of jurisdiction by that court. Such a person ought to be encouraged to submit to the jurisdiction.
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7. Want of *bona fide* will not necessarily be imputed to liquidation resolutions however small the assets immediately available may be, if the debtor has substantial *bona fide* claims the subject of pending litigation.
8. The debtor, at a meeting of his creditors under a liquidation petition, is only bound to answer proper and material questions, and the meeting has power to prevent the putting of irrelevant or improper questions, or questions which are put, not in the interest of the creditors, but for a collateral object. But the decision of the meeting is subject to review by the Registrar or the court.
9. The creditors cannot delegate to any one their statutory power of granting the debtor his discharge. A resolution doing this is *ultra vires*. But the Registrar or the court can strike it out and direct the other resolutions to be registered with out it:
10. *Per JAMES, L.J.*: *Semble*, that the effect of rule 301 of the Bankruptcy Rules, 1870, is to make the creditors, if they act *bona fide*, the sole judges whether the debtor has given sufficient information as to his affairs.
11. The statement of affairs of a debtor who had filed a liquidation petition showed that his unsecured debts amounted to £43,897 and his assets to £120. Besides this, he stated that he had two claims which were being prosecuted in two suits. As to one of them he said that he could not estimate its money value, but that there should be no difficulty in obtaining a very large sum, and as to the other he said that it was a claim for a considerable sum. At the first meeting of the creditors the solicitor and proxy of a company, who had been made defendants to one of the suits but who had successfully demurred, and who were creditors for £62, the amount of their costs in the suit, put various questions to the debtor with reference to the claim in that suit. Ultimately the debtor objected to answer one of the questions put, and, on the advice of his solicitor, declined to answer any more questions, on the ground that the examination was really for the purpose of obtaining evidence to assist the defendants in their defence of the suit. The meeting approved of the debtor's refusal to answer, and resolved that the examination should not be continued. A creditor for £2,000, named Strousberg, who was present, told the meeting that he would for the benefit of the creditors prosecute the claims at his own risk. The creditors resolved by the proper majority, 1, that the debtor's affairs

- should be liquidated by arrangement; 2, that Strousberg should be appointed trustee without a committee of inspection; 3, that the debtor's discharge should be granted when the trustee should certify his consent thereto in writing; 4, that, having regard to the fact that the matters forming the subject of the questions of the company's solicitor were *sub judice*, the debtor was perfectly justified in declining to answer such questions. The company and the defendants to the other suit opposed the registration of the resolutions, but the judge of the county court decided that they ought to be registered. The decision of the county court judge was reversed by Bacon, C.J.:
- Held*, by James and Brett, L.JJ. (*dubitante*, Cotton, L.J.), reversing the decision of Bacon, C.J., that there was not sufficient evidence to show that the resolutions had not been passed *bona fide*, and that they ought to be registered, with the exception of the third resolution, which was *ultra vires*.
12. *Per* Cotton, L.J.: It was doubtful whether the creditors, without further information as to the validity of the claims in the two suits, could have been acting *bona fide* in passing resolutions not merely for a liquidation by arrangement, but empowering the trustee to fix the time when the debtor should have his discharge. *Matter of Hope*. 205
13. A debtor described himself in his liquidation petition by his business address only, omitting all mention of his private residence:
- Held*, that this was a misdescription; that the defect was not a mere formal one, but was a matter of substance; and that resolutions passed by the creditors in favor of a liquidation by arrangement ought not to be registered.
14. And an application for leave to amend the petition, and summon a fresh first meeting of the creditors, was refused. *Matter of Jerningham*. 252
15. Where a special resolution of creditors under the Bankruptcy Act, 1869, s. 48, has been properly passed, stating that in their opinion the bankrupt cannot justly be held liable for his failure to pay 10s. in the pound, and desiring his discharge, and the terms
- of the section are in other respects strictly complied with, the court has no discretionary power to refuse the bankrupt's application for discharge. *Matter of Hamilton*. 448
16. In construing the 148d of the Bankruptcy Rules, 1870, the words "decision" and "order" mean the same thing; and the twenty-one days within which an appeal from a county court to the chief judge must be brought are to be reckoned from the date of the settling and signing of the order.
17. The decision in *Ex parte Garrard* does not apply to the case of an appeal from a county court to the Chief Judge in Bankruptcy. *Matter of Cochrane*. 449
18. The creditors of a liquidating debtor resolved that his discharge should be granted "on the certificate of the committee of inspection that he is entitled thereto." When the estate had been realized the committee refused to give the certificate. They alleged that the debtor had paid £5 to induce a person not to bid at a sale of his book debts by auction. The debtor did not deny this:
- Held* (reversing the decision of the county court), that the court had no jurisdiction to order the Registrar to sign a certificate of the debtor's discharge. *Matter of Chesney*. 449
19. The bankrupt, who was a banker's clerk, having absconded on the 16th of March, 1877, defalcations to the extent of a few hundred pounds were being discovered, when on the 24th of the same month the bankers received from the bankrupt a letter confessing thefts to the amount of £7,852 19s. Instructions were given on the 26th, in consequence of which a warrant for his apprehension was, on the 28th, placed in the hands of a detective, who failed to find him in England.
- Conversations on the 19th, and again on the 22d of March, between a partner of the bank and relatives of the bankrupt, were deposed to. In the course of the former the partner said, "My advice is, that he should get out of the country to America, or elsewhere;" and on the latter occasion an offer having been made by the bankrupt's wife that the bankrupt should

return and throw himself on the mercy of the bank, the partner said, "No, if he did that, we should be obliged to prosecute him; if he were abroad, I don't suppose we should trouble further for him." It was also in evidence that after the conversation on the 19th, one of the relatives who was present had an interview with the bankrupt in this country, since which he had disappeared.

The Registrar of the county court having refused to admit to proof a claim of the bankers for the sum of £7,852 19s. :

Held, that there was not proof of such negligence on the part of the bankers to bring the criminal to justice as disentitled them to prove for the amount stolen; and appeal allowed. *Matter of Turquand.* 449

20. By virtue of sects. 10 and 11 of the Bankruptcy Act, 1869, an adjudication of bankruptcy is, so long as it stands, conclusive as against a third person; e.g., the holder of a bill of sale executed by the bankrupt, that the act of bankruptcy, on which the adjudication was professedly founded, was in fact committed, and that the title of the trustee relates back to that act of bankruptcy. *Matter of Learoyd.* 452

21. A liquidating debtor had consigned goods to commission merchants for sale, and they had made advances to him. They alleged that a balance was due to them from his estate, and the trustee in the liquidation alleged that a balance was due from them to the estate. They had not, however, tendered any proof or made any formal claim against the estate :

Held, by the Chief Judge and by the Court of Appeal, that, inasmuch as, if the trustee was right, there was a mere money demand by him against a stranger to the liquidation, the Court of Bankruptcy ought not, on the application of the trustee, to order accounts to be taken of the dealings between the debtor and the commission merchants; but that the trustee ought to proceed by action in the high court. *Matter of Musgrave.* 539

22. A creditor appearing on a winding-up petition is not entitled to his costs as a matter of right : to entitle him to them he must show a reasonable ground for appearing; and if he appears merely

to ask for them, and nothing more, they will be refused. *Matter of Hull, etc.* 576

23. In determining whether the amount for which an execution is to be levied exceeds £50, possession money may be taken into account even after an injunction has been granted restraining the sheriff from selling the goods. *Matter of Lithgow.* 601

24. One of the creditors of a bankrupt held two bills of sale of his chattels. Objections had been raised by the trustee to the validity and extent of the security, though no steps had been taken to set it aside. Ultimately, the mortgagee offered to pay £620 to the trustee. A meeting of the creditors was held, under sect. 28 of the Bankruptcy Act, 1869, when it was resolved to accept the mortgagee's offer; that the bankruptcy should be thereupon annulled; and that the mortgagee should release his claim on the bankrupt's estate, and the bills of sale should not be disputed by the trustee. The resolutions were approved by the court, and, upon the trustee certifying that the terms of them had been completed to his satisfaction, an order was made annulling the bankruptcy. The £620 was divided among the creditors other than the mortgagee. The mortgagee realized his security, but did not obtain enough to pay his debt in full. Six years afterwards it was discovered that the bankrupt had concealed a reversionary interest to which he was entitled at the date of his adjudication, and an order was obtained discharging the annulling order, and directing that the bankruptcy should proceed as if that order had not been made. The trustee then received the reversionary interest, which had fallen into possession :

Held (reversing the decision of Bacon, C.J.), that the mortgagee, equally with the other creditors, was remitted to his original rights, and was entitled to prove for the unpaid balance of his debt. *Matter of Jarvis.* 607

See ADVERSE PARTY, 452.

CHATTEL MORTGAGES, 719.
LANDLORD AND TENANT, 84,
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STOCKHOLDERS, 142.
TRUSTS AND TRUSTEES, 781.

BILLS OF SALE.

See CHATTEL MORTGAGES, 196, 204 *note*.
 SALE, 528, 587 *note*.

BONDHOLDERS.

See CORPORATIONS, 488.

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See PRINCIPAL AND AGENT, 83, 45 *note*.

BUILDINGS.

See MUNICIPAL CORPORATIONS, 438.

BY-LAWS.

See MUNICIPAL CORPORATIONS, 438.

C.

CASES AFFIRMED, REVERSED,
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- Aaronson, Matter of, 7 Chy. Div., 718,
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 Allsopp v. Day, 7 H. & N., 457, *dis-
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 Anglo, etc., v. Davies, 26 Eng. R., 108,
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 5 D. M. & G., 52, *considered.* 626
 Barclay, Matter of, 10 Eng. R., 605,
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 8 C. P., 175, *disapproved.* 372
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 Byerly v. Prevost, L. R., 6 C. P., 144,
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 Chapman v. Brown, 6 Ves., 404, *dis-
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 Cherry v. Boulton, 2 Keen, 319; 4
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 Christie v. Ovington, 1 Chy. Div., 279,
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 Clayton's Case, 1 Mer. 605, *followed.* 579
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 Cully, Matter of, 9 Chy. Div., 307, *con-
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 546, *explained.* 487
 Haselfoot, Matter of, L. R., 13 Eq., 327,
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 Herrick v. Franklin, L. R., 6 Eq., 598,
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 Hinton, Matter of, L. R., 19 Eq., 266,
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 Hewer v. Cox, 8 Ell. & Ellis, 428, *fol-
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 Laker v. Horden, 1 Chy. Div., 644,
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 Lloyd v. Lloyd, L. R., 2 Eq., 722, *fol-
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 Magistrates v. Morris, 8 Macq., 134,
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 Miller v. Miller, L. R., 8 Eq., 499, *dis-
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 Mounsey v. Blamire, 4 Russ., 394, *dis-
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 Murray v. Mackenzie, 14 Eng. Rep.,
 469, *distinguished.* 786
 National Bank, Matter of, L. R., 14
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 R., 357, *followed.* 594
 Pearce v. Lindsay, 1 D. F. & J., 573,
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 Philips v. Hornstedt, 1 Ex. Div., 62,
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 Regina v. Mayor, L. R., 6 Q. B., 652,
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Reynolds v. Godlee, John. (Eng.) Chy.,
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Royle, Matter of, 26 Weekly Rep., 216,
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Stourton v. Stourton, 8 D. M. & G., 760,
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Thompson v. Barrett, 1 L. T. Rep.,
(N.S.), 268, *distinguished*. 523
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lowed*. 594
White v. Simmons, L. R., 6 Chy., 553,
considered. 192
Williams, *Ex parte*, 23 Eng. R., 469,
distinguished. 740
Woodhouse v. Murray, L. R., 2 Q. B.,
634, 4 id., 27, *followed*. 719

by virtue of the reputed ownership
clause to the trustee in the liquidation.

2. But *held*, that, as regarded the trade fixtures, the mortgage was, by reason of non-registration, void as against the trustee only to the extent of the liquidating debtor's original moiety.
3. When there is a mortgage of leasehold property and fixtures with a power of sale, the Bills of Sale Act applies not only where the power of sale authorizes the mortgagee to sell the fixtures separately from the leasehold property, but also where there is a separate assignment of the fixtures. *Ex parte Brown*. 196, 204 *note*.
4. An inventory of goods with receipt for purchase-money attached, the vendor remaining in apparent possession of the goods, is a bill of sale within the meaning of the Bills of Sale Act, 1854, and requires registration.

5. A trader on the 28th of August executed a bill of sale of substantially the whole of his property to secure a debt for which the grantee had recovered judgment on the 3d of July, and another debt which he owed the grantee. The grantor had on the 4th of July written a letter to the grantee, undertaking, in the event of his not issuing execution on the judgment, to execute to him on demand a bill of sale to secure the judgment debt and such other sums as he owed him. The grantee did not enter into any agreement not to enforce the judgment, but in fact he did not issue execution. On the 29th of August another creditor levied execution at the grantor's place of business, and on the 1st of September the grantor filed a liquidation petition. He had between the 4th of July and the 29th of August received by the carrying on of his business sums amounting to £10,000:

Held, that no equivalent had been given for the bill of sale, and that it was void as against the trustee in the liquidation.

6. An appellant who had failed in proving allegations of fraud, as to which he had adduced a mass of evidence, but who had succeeded on a point of law, was deprived of his costs. *Matter of Cooper*. 719
7. A farmer, whose real name was Joseph Wood, but who had assumed the name

CHARITABLE USES.

See STOCKHOLDERS, 153.

CHATTEL MORTGAGES.

1. On the 29th of April, 1876, two partners in trade executed a mortgage of their trade fixtures and loose chattels. The mortgage was not registered as a bill of sale. On the 7th of June, 1876, the partnership was dissolved, and the business was thenceforth carried on by one of the two partners alone. On the 29th of January, 1877, the outgoing partner executed an assignment of his half share in the mortgaged property to the continuing partner, subject to the mortgage. On the 22d of March, 1878, the continuing partner filed a liquidation petition. At the date of the filing of the petition the mortgaged property was in his sole possession. The retiring partner remained solvent. The mortgagee had not demanded possession of the loose chattels, but there was no evidence of any actual consent on his part to the change of possession: *Held*, that the loose chattels passed

of Joseph Albert Wood, and had become known to his creditors by that name, executed a bill of sale in which he was described as "Joseph Wood, of Lache Hall Farm, in the county of Chester, farmer." The same name and description were given in the affidavit filed on the registration of the bill of sale. Lache Hall Farm was situate a short distance outside Chester, but was really within the county of the city of Chester, not in the county of Chester. It did not appear that there was any other farm of the same name in the county of Chester:

Held, by the Chief Judge and by the Court of Appeal, that the registration was valid. *Matter of M'Hattie*. 786

8. A bill of sale of chattels empowered the grantee to take possession in case (*inter alia*) the grantor should become embarrassed in his affairs, or in case any action at law should be commenced against him. There was a subsequent proviso that, until default should be made in payment, according to the covenant and proviso therein contained, it should be lawful for the grantor to retain possession:

Held, by the Court of Appeal (reversing the decision of Bacon, C.J.), that the prior clause was not controlled by the subsequent proviso, but that on the happening of one of the specified events, the grantee was entitled to take possession, though no default in payment had been made by the grantor.

9. In order to exclude the operation of the reputed ownership clause, a real possession, even though it be friendly, is sufficient.
10. But, to satisfy the Bills of Sale Act, the possession must be apparent as well as real. *Matter of Francis*. 795

See SALE, 206, 523, 527.

CHILDREN.

See PRESUMPTION, 195, 196 note.

CHOSE IN ACTION.

See ASSIGNMENT, 25.
PRESUMPTION, 25.

CODICILS.

See WILLS, 73.

COMPOSITION.

See BANKRUPTCY, 205.

CONDITION.

See CREDITORS, 594.

CONDITIONAL SALE.

See SALE, 206, 210 note; 523, 527 note.

CONSOLIDATION OF ACTIONS.

1. One of a number of actions brought by different plaintiffs against the same defendants in respect of an alleged misrepresentation in the prospectus of a company, was ordered to be a test action, the trial of which was to bind all the plaintiffs but not to bind the defendants. When the test action came on for trial the plaintiff did not appear, and judgment was given for the defendants:

Held, that, though the order contained no express provision to that effect, the court had power to substitute another of the actions as the test action, and that, as the trial of the original test action had failed to be a real trial of the issue between the plaintiffs and the defendants without any fault of the other plaintiffs, this substitution ought to be made.

2. In the absence of agreement the plaintiff in an action thus constituted a test action has no right to be indemnified against costs by the other plaintiffs. *Amos v. Chadwick*. 243, 249 note.

CONSTRUCTION.

See WILLS.

COPYRIGHT.

1. In registering the copyright of a book at Stationers' Hall it is sufficient to enter the first publisher, under the trade name of the firm, and the actual proprietor of the copyright at the time of registration, without stating who the first proprietor was, or how the copyright devolved upon the present proprietor.
2. Copyright in the "title" of a book, as being a material portion of a work, will be protected, although another book published under a similar title may be totally different in form and contents.
3. The proprietor of a copyright does not lose his right of republication, although the book may have been out of print and obsolete, and of little or no value, for any number of years.
4. To sustain an allegation of acquiescence in the infringement of a copyright, it must be shown that there was knowledge of the infringement. *Well-don v. Dicka*. 665

CORPORATIONS.

1. A petition was presented by two policy-holders to wind up compulsorily an insurance company which was being wound up voluntarily, containing charges of false representations and insolvency:

Held, upon a preliminary objection, that where a company was being wound up voluntarily it was unnecessary to consider whether a *prima facie* case was stated, nor to order security for costs under the Assurance Companies Act, 1870:

2. *Held*, upon demurrer to the petition, that policy-holders might present a petition under the act of 1870, although their debts did not amount to £50; that a statement—that under the circumstances the company was "admittedly insolvent"—was a sufficient statement that they could not pay their debts; and that the allegations of false representations, and the appointment of the secretary as provisional liquidator, were sufficient to

render it just and equitable to make a winding-up order:

3. *Held*, also, that upon demurrer to a petition, the counsel for the petitioner must open his case. *Matter of British*, etc. 405
4. An unregistered company, incorporated by act of Parliament, borrowed money under the powers of their act upon debentures, and the debenture holders, not being able to get payment of their principal or interest, obtained the appointment of a receiver, but the profits of the concern not being sufficient to keep down the interest upon the debentures, the debenture holders presented a petition for winding up the company, and for sale of the concern:
Held, that the only rights the debenture holders had under the act of Parliament were the appointment of a receiver and priority over other debtors; and not being in the position of ordinary mortgagees, they could have no winding up or sale of the undertaking. *Matter of Herne-Bay*, etc. 488

See EMINENT DOMAIN, 394, 404 note.

NAME, 339, 346 note.

PRESUMPTION, 148, 151 note.

SET-OFF, 872, 883 note.

STOCKHOLDERS, 6, 331, 338 note;
386, 392 note; 562, 573 note.

COSTS.

1. In a case of considerable complication, in which charges of fraud were made against the defendant, judgment having been given for him with costs, he was allowed the costs of employing three counsel, though the Taxing Master had only allowed the costs of two.
2. The costs of making for the use of counsel copies of a shorthand writer's notes of evidence taken at the trial will not be allowed as between party and party, unless a special direction to that effect is given by the judge at the trial. *Kirkwood v. Webster*. 81
3. When executors and administrators liable for costs and when not. *Boyn-ton v. Boyn-ton*. 81, 83 note.
4. When expense of stenographer's notes

cannot be charged *as Ashworth v. Outram*, 265, 268 *note*.

5. A., B., and C. agreed with a company to take 1,400 £1 shares, to be equally divided among them, in respect of which shares £310 had been paid generally. The company having been afterwards ordered to be wound up, an order was made putting A. on the list of contributories for 157 shares, B. for 466, and C. for 467. A. was put on the list for 157 shares only, because the judge considered that under an arrangement between the parties the £310 was to be attributed to A.'s shares, so that 310 of them were fully paid up. B. appealed generally from this order, serving only the official liquidator. The Court of Appeal was of opinion that B. was properly put on the list, but that the £310 was attributable to all the 1,400 shares.

Held (by James and Baggallay, L.J.J., *dissentiente* Thesiger, L.J.), that a direction crediting B. with one-third of the £310 ought to be made, though there was now no opportunity of altering the order as against A.

6. The costs of shorthand notes of evidence in the court below are not to be allowed as a matter of course upon an appeal, but only where a case is made for such allowance. *Dutchess, etc., Lead Ore Co.* 715

See BANKRUPTCY, 576.

LEGACY, 487.

PARTNERSHIP, 609, 625 *note*.

SECURITY FOR COSTS, 803.

TRUSTS AND TRUSTEES, 354.

CONTRIBUTION.

See PARTNERSHIP, 609, 625 *note*.

COUNSEL.

See ASSIGNMENT, 25.

ATTORNEYS, 701.

PRESUMPTION, 25.

PRINCIPAL AND AGENT, 33, 45 *note*.

COUNTER-CLAIM.

1. The executors of M., a holder of debentures of a company to the amount of £2,000, commenced an action to have

the trusts of a deed for securing payment of the debentures of the company carried into execution. The company delivered a defence and counter-claim. By the defence they alleged that an amount exceeding £2,000 was, under the circumstances mentioned in the counter-claim, due from M. to the company, and claimed a set-off. By the counter-claim they alleged that M. had been a director and promoter of the company, and while filling those characters had joined with other persons in selling an estate to the company at a profit, concealing the fact of his interest in the estate, and that he had received more than £2,000 as his share of the profit of the transaction. The counter-claim asked that the executors might be ordered to pay to the company the share of profit which M. had received, and also the remainder of the profit which, in breach of his duty as a director, he had allowed to be received by the other vendors. The plaintiffs applied to have the counter-claim excluded on the ground that it could not be conveniently disposed of in the present action, and ought to be tried in an independent proceeding. The application having been refused by Hall, V.C., the plaintiffs appealed:

Held, that although, taking Order XIX, rule 3, and Order XXII, rule 9, together, the question whether a counter-claim shall be excluded is not so entirely in the discretion of the judge of first instance as to preclude an appeal, he has a discretion which will not be interfered with by the Court of Appeal except in a very strong case, and that in the present case this discretion had been rightly exercised. *Huggons v. Tweed*. 761

See SET-OFF, 372, 383 *note*.

COVENANTS.

1. The covenants for title in a mortgage of a freehold estate, whether read in connection with the word "grant" or not, do not amount to that precise averment that the mortgagor is seised of the legal estate which is necessary to create an estoppel as against him and persons claiming under him.
2. A., by deed, purported to grant a freehold estate to B. by way of mortgage. The deed contained no recitals,

but there were the usual mortgagor's covenants for title, including a covenant that the mortgagor "had power to grant the premises in manner aforesaid."

The mortgage was accepted by B. on the faith of certain forged title deeds produced and handed to him by A. At the date of the mortgage A. had not the legal estate nor any interest whatever in the property. Subsequently, however, A. acquired the legal estate and mortgaged it to C.:

Held, that, inasmuch as the mortgage to B. contained no precise averment that A. was seised of the legal estate, no estoppel had been created in favor of B. as against C. *General Finance, etc., v. Liberator, etc.* 468, 471 *note*.

CREDITORS.

1. Testatrix, who died in February, 1875, by her will in February, 1874, bequeathed the residue of her property to trustees to pay the residue of the income in fourths to her sons and granddaughters for life, and there was a clause of forfeiture in case either of the sons or granddaughters should become insolvent or be declared bankrupt.

W. (a son) was adjudicated bankrupt in June, 1878. The testatrix was a creditor, and proved in the bankruptcy. In March, 1875, W. offered a composition, and it was accepted by the creditors, but the arrangement could not at that time be carried into effect. The trustees under the will filed a bill in July, 1875, for the administration of the trusts, and the usual decree was made in July, 1876. In May, 1878, the composition was agreed upon and approved by the court in June following, and an order was made for the annulment of the bankruptcy. On further consideration of the cause:

Held, that, upon the principle laid down in *White v. Chitty*, and *Lloyd v. Lloyd*, and in *In re Parnham's Trusts*, there was not a forfeiture. *Ancona v. Waddell*. 594

CREDITOR'S SUIT.

See RECEIVER, 108.

CUSTOM.

See PRINCIPAL AND AGENT, 38, 45 *note*.
TRADE-MARK, 269.

D.

DAMAGES.

See PARTNERSHIP, 609, 625 *note*.

DEBTOR AND CREDITOR.

See CREDITORS.

CREDITOR'S SUIT.

EXECUTORS AND ADMINISTRATORS, 348.

DECLARATIONS.

See DOMICIL, 226.

DEVISE.

See WILLS, 478.

DIRECTORS.

1. When acting as no notice, stock placed to credit of on books of company. *Hallmark's Case*. 148

See PRESUMPTION, 148.

STOCKHOLDERS, 886, 892 *note*; 562, 578 *note*.

DISCOVERY.

1. In an action in the Chancery Division interrogatories may be delivered before the statement of defence. *Harbord v. Monk*. 394

2. Upon an application for leave to serve interrogatories on a member of a company which is a party to an action, leave will be given where the judge is satisfied that the member sought to be interrogated is likely to be able to give discovery; and the judge is not bound at this stage of the proceedings to consider the propriety of the proposed interrogatories. *Berkeley v. Standard, etc.* 405

3. Where a plaintiff of unsound mind sues by a next friend, the defendant is entitled to an affidavit of documents made by the next friend or by some one acquainted with the facts. *Higginson v. Hall.* 654

DISCRETION.

See POWERS, 411.
TRUSTS AND TRUSTEES, 685, 690 note.

DISTRESS.

See LANDLORD AND TENANT, 740.

DOMICIL.

1. The testator in the suit was a Frenchman, but had lived twenty-seven years in England, during the greater part of which time he was a partner in an English house of business, paying occasional visits to France. He married successively, in English churches, two wives, who were Englishwomen and Protestants, though himself a Roman Catholic, and his children were brought up in England as Protestants. He made his will in the English form, and left his property in a manner inconsistent with French law. Upon an action to establish a French domicile, numerous witnesses deposed that he had made various parol declarations that he intended to return to France when he made his fortune. It was also proved that he always refused to be naturalized in England, and would not take a lease of more than three years of his house:

Held (affirming the decision of Malins, V.C.), that the acts of the testator manifested an intention to acquire an English domicile; and that his declarations of intention to return to France when he had made his fortune were not sufficient to rebut the conclusion to be derived from the facts of his life, especially of his English marriages. *Doucet v. Geoghegan.* 226, 242 *note.*

See LEX LOCI, 10, 12 note.

DUTY.

See WILLS, 691.

E.

ELECTION.

See LEGACIES, 176.

EMINENT DOMAIN.

1. The plaintiff was the owner of a leasehold house in H. street, and of five freehold cottages in B. Row, which ran parallel to H. Street, the yards at the back of the cottages abutting on the back yard and buildings held with the house in H. Street. The plaintiff used the house in H. Street as a dwelling house and shop, and the buildings behind it as a candle manufactory, candle store, bread store, and provision store. One of the cottages in B. Row was turned into a storehouse, and was made to communicate with the H. Street premises, and was used as a back entrance to them.

A tramway company gave notice to treat for the five cottages in B. Row and the yards behind them. The plaintiff gave a counter-notice that the land proposed to be taken was part of premises occupied by him as a manufactory, and calling upon the company to take the whole of the premises; and on the company's refusal he brought an action asking for a declaration that he might not be compelled to sell the part only

of his "manufactory buildings and land" which was comprised in the notice to treat; and for an injunction:

Held, by Hall, V.C., that the whole block of buildings constituted one "manufactory" within the meaning of the 92d section of the Lands Clauses Act, and that the company was bound to take the whole.

2. *Held*, by the Court of Appeal (affirming the decision of Hall, V.C.), that the whole block constituted one "house" within the meaning of the section:
3. *Held*, by Brett, L.J., that the whole block also constituted one "manufactory."
4. The words "house or other building or manufactory" in the 92d section of the Lands Clauses Act refer to three distinct things; and it is sufficient that the owner of premises, part of which is required by a company, should specify the premises which he requires them to take without stating whether he makes the claim on the ground that they are a "house," or a "building," or a "manufactory." *Richards v. Swansea, etc.* 212
5. A railway company purchasing land for the railway acquires an absolute fee simple, but such fee simple is acquired solely for the purposes of constructing and using the railway.
6. A railway company has no right to erect hoardings to prevent prescriptive rights being acquired for windows looking across the line of railway.
7. A railway company is liable to an action for nuisance for using their rights so as to injure the neighboring landowner where they might use them without such injury.
8. A railway company may by their conduct abandon land outside their fence which was formerly theirs, so as to permit the adjoining owner to acquire such land by adverse possession. *Norton v. London, etc.* 394, 404 note.
9. Where a railway company, prior to entering upon lands, has made a deposit in the bank and given a bond under sect. 85 of the Lands Clauses Consolidation Act, 1845, the court has jurisdiction, under sect. 87, in the event

of the non-performance of the condition of the bond, to order payment out of the deposit to the landowner on a petition presented by him for that purpose adversely to the company. *Matter of Mutton's Estate.* 576

See VENDOR'S LIEN, 192, 194 note.

EQUITY.

See FRAUD, 731.
PETITION, 25.

ESTOPPEL.

See BANKRUPTCY, 452.
COVENANT, 463, 471 note.
LACHES, 17.

EVIDENCE.

See DOMICIL, 226.
PRESUMPTION, 148, 151 note.

EXECUTORS AND ADMINISTRATORS.

1. A plaintiff died after having obtained a decree with costs, and having appointed one of the defendants, who had a concurrent interest with her, her executor. Two others of the defendants served notice of appeal. The executor after this obtained the common order of revivor. The appeal afterwards came on to be heard, and the bill was dismissed with costs as against the appellants:
Held, that the executor had adopted the suit for all purposes, and that the costs were payable by him personally, and not merely out of the estate of the original plaintiff. *Boynston v. Boynston.* 81, 83 note.
2. Right of mortgagee to retain surplus in payment of debt due from decedent to him. *Talbot v. Frere.* 848

3. Letters of administration of the estate of an intestate were granted *ex parte* to the defendant, as "his natural and lawful brother of the half-blood." The plaintiff, who was an uncle of the intestate, then commenced an action in the Chancery Division for the administration of the estate, alleging that the defendant was illegitimate, and that he himself was next of kin; and moved for a receiver and an injunction:

Held, by LUSH, J., that the application must be refused, for that as long as the letters of administration remained in force they were conclusive evidence that the defendant was one of the next of kin, and that the plaintiff's proper course of procedure was to apply in the Probate Division to have them recalled. *Hankin v. Turner*. 767

See LEGACY, 487.

LEX LOCI, 10, 12 *note*.

PARTIES, 120.

REAL ESTATE, 601, 607 *note*.

SET-OFF, 431.

TRUSTS AND TRUSTEES, 354, 360, 364 *n*.

F.

FEE TAIL.

1. A testator, by will made in 1820, devised and bequeathed freeholds and leaseholds together to his daughter S. for life, remainder to her first and other sons successively in tail, remainder to her daughters as tenants in common in tail, and "in case of default of issue" of S., to "the right heirs" of S. "forever."

S. having married and died a widow, without having had a child:

Held, that she took an absolute interest in the leaseholds. *Comfort v. Brown*. 585

FELONY.

1. When failure to prosecute does not deprive of dividend in bankruptcy. *Matter of Turquand*. 449

FIRE.

See MUNICIPAL CORPORATIONS, 433.

FIXTURES.

1. The effect of a disclaimer by the trustee in a liquidation of a lease vested in the debtor is to place the trustee in the position of never having had any estate in the leasehold property.

2. Consequently, any severance by the trustee of the fixtures attached to the property after the date at which the term is put an end to by the disclaimer, i.e., the date of the trustee's appointment, is necessarily a wrongful act, and gives the landlord a right to recover the value of the fixtures from the trustee.

3. Whether, after severing the fixtures, the trustee has any right to disclaim the lease, *quære*.

4. But at any rate he cannot as against the landlord assert the invalidity of his own disclaimer. *Matter of Brook*. 543, 554 *note*.

See CHATTEL MORTGAGES, 196, 204 *note*.

FORECLOSURE.

See CORPORATIONS, 488.

MORTGAGE FORECLOSURE, 576.

FOREIGN SOVEREIGN.

See SOVEREIGN, 166.

FORFEITURE.

See CREDITORS, 594.

FORMER SUIT.

See BANKRUPTCY, 452.

EXECUTORS AND ADMINISTRATORS, 767.

FRAUD.

1. The plaintiffs brought an action against the defendants to restrain alleged in-

fringements of a patent process for printing on metal plates. The plaintiffs printed from dry lithographic stones put into relief. The defendants alleged that they the defendants printed by the ordinary damp lithographic process from flat stones. Pending the proceedings, an order was made by the Court of Appeal that an expert named by the plaintiffs and not objected to by the defendants, should be at liberty to inspect the defendants' process, and the defendants gave an undertaking to show him the whole process. The inspector examined the process, and was shown twenty-seven stones used by the defendants, and reported to the effect that the defendants' mode of printing was the same as the ordinary process of lithography, except that tin was used instead of paper. The action being tried on these materials was ultimately dismissed by the Court of Appeal. The plaintiffs shortly afterwards commenced an action to have it declared that the judgment on the appeal had been obtained by fraud, and for consequential relief. The alleged fraud was that the defendants, when the inspection took place, had in use not only the above twenty-seven stones, but also stones on which the designs were placed in relief—that they removed such latter stones from the place where the inspection took place, in order to conceal from the inspector the fact that they had stones on which the design was in relief—that they falsely stated to the inspector that they had no other stones than those shown to him—and that the defendants stated to the inspector that the ink used by them was ordinary lithographic ink, whereas in fact they used ink specially prepared for the plaintiffs' use by a particular manufacturer for printing by the dry process. Bacon, V.C., considered the case of fraud proved, and made a decree in the plaintiffs' favor, but the Court of Appeal was of opinion that no fraud was proved, and dismissed the action.

Per James and Thesiger, L.J.J., dissentiente Baggallay, L.J.: *Seem*, that an action to impeach a judgment on such grounds was not maintainable. *Flower v. Lloyd*. 731

See ACCOUNTS, 309, 327.

NAME, 339, 346 note.

SPECIFIC PERFORMANCE, 64, 71 note.

FRAUDULENT PREFERENCE.

See STOCKHOLDERS, 142.

FRAUDULENT TRANSFERS.

See CHATTEL MORTGAGES, 719, 795.

G.

GIFT.

See HUSBAND AND WIFE, 365, 371 note.

GOVERNMENT.

1. Where a company is being wound up under the provisions of the Companies Act, 1862, the Crown has a right to payment in full of a debt due from the company for property tax before the commencement of the winding-up, in priority to the other creditors. *Matter of Henley*. 252, 265 note.

GUARDIAN.

See DISCOVERY, 654.

H.

HEIR.

See REAL ESTATE, 601, 607 note.

TRUSTS AND TRUSTEES, 360, 364 note.

HOTCHPOT.

See ADVANCEMENTS, 6, 9 note.

HUSBAND AND WIFE.

1. The trustee of a sum of stock for the separate use of a married woman having improperly transferred it into the joint names of her husband and himself, the husband for six years received the dividends, after which the trustee died, and the husband, without his wife's knowledge, sold out the stock, and applied the proceeds to his own use. Some time afterwards he left her:

Held, that, though the wife might have been presumed to have assented to the husband's actual receipt of the dividends while the stock remained intact, yet no such assent could be presumed after it had been sold, and that she was entitled to recover, as against her husband and the estate of the deceased trustee, the arrears of dividends which had accrued since that time, as well as to have the trust fund replaced. *Dixon v. Dixon*. 365, 371 *note*.

See PARTITION, 700.

I.

INFANTS.

1. A person who was tenant for life under a will of a property producing a net income of about £140, died insolvent in 1853, leaving a daughter not a year old, who thereupon became entitled to the property, and a widow. The father was the son of a retired tradesman in a small way of business. In November, 1853, the widow being wholly without means of support, an order was made directing the whole income to be applied for the maintenance of the infant, and directing the two persons who were trustees of the will to pay it to the widow for that purpose. One of the trustees died in 1861. In 1863 the widow married a gentleman of good position but small means. No fresh application to the court was made, but the surviving trustee went on paying the whole income to the mother till 1873, when the daughter came of age. The daughter then filed her bill, alleging that after her mother's second marriage the payment of the whole income to her was improper, and asking to

have an account of the past income, and to have the balance of it paid to herself after deducting a proper allowance for her maintenance and education. It was shown that the plaintiff had been well educated, and had lived as a lady, that her social position had been much improved by her mother's marriage, and that the income, so far as not expended on herself personally, had been applied towards the expenses of the step-father's establishment, of which she had the benefit:

Held, by the Master of the Rolls, that the order for maintenance ceased to be operative on the death of one of the trustees, but that the allowance of the whole income for maintenance would, under the circumstances, have been sanctioned by the court if applied to on the death of the trustee, and again on the mother's marriage, and that the whole income ought, therefore, now to be treated as having been properly applied.

2. On appeal, the decision that the income ought to be treated as properly applied was affirmed, but the court was of opinion that the order for maintenance had come to an end only on the marriage of the mother, and not on the death of the trustee. *Brown v. Smith*. 772

See DISCOVERY, 654.

INFORMATION AND BELIEF.

See MOTION, 92.

INJUNCTION.

See LACHES, 17.

PARENT AND CHILD, 494, 518 *note*.

TRADE NAME, 703.

VENDOR'S LIEN, 192, 194 *note*.

IRREGULARITY.

See APPEAL, 450.

INSURANCE COMPANY.

See CORPORATIONS, 405.

INTERNATIONAL LAW.

See LEX LOCI, 10, 12 *note*.

J.

JUDGMENT.

See FRAUD, 781.

MORTGAGE FORECLOSURE, 576.

JURISDICTION.

See BANKRUPTCY, 192.

SOVEREIGN, 166.

L.

LACHES.

1. When an injunction is sought in aid of a legal right, the court is bound to grant it if the legal right is established.
2. Therefore mere lapse of time will not be a bar to the granting of the injunction, unless it would be a bar to the legal right.
3. To an action for an injunction to restrain the defendant from representing that the business carried on by him was the same as that carried on by the plaintiff, it was objected that the plaintiff had known for between two and three years before issuing his writ the facts on which he relied:
Held, that this delay was no bar to the action. *Fullwood v. Fullwood*. 17

LAND.

See STOCKHOLDERS, 153.

LANDLORD AND TENANT.

1. A trustee in bankruptcy who takes actual possession of leasehold property of the bankrupt, and does not, when called upon by the landlord so to do, disclaim the lease in the way provided by sect. 23 of the Bankruptcy Act, 1869, is personally liable for the rent which accrues due after he takes possession.
Sect. 35 of the act only gives the landlord a right of proof for the proportionate part of the rent up to the date of the adjudication, but does not relieve the trustee from his personal liability.
2. *Semble*, the court could not have decided this question in the absence of the submission of the parties. *Ex parte Dressler*. 84, 90 *note*.
3. Where an application is made under the statute 6 Anne, c. 18, s. 1, to the party in possession of an estate for the production of a *cestus que vie* to the person entitled to the estate in remainder, and the party in possession does not respond to the application, the applicant is entitled to an order for production. *Matter of Owen*. 599, 601 *note*.
4. A limited company gave, in 1875, a mortgage to its bankers for its account current, by covenant to surrender its copyhold works, and by the mortgage deed the company became tenant to the bankers at the rent of £5,000. No surrender of the copyholds was made. On the 16th of July, 1877, the bankers sent an auctioneer to distrain for £10,000, being two years' rent. The auctioneer, on the same day, saw the managing director of the company, gave him formal notice of distraint, and by arrangement with him employed two workmen of the company to keep possession of the chattels distrained. On the 18th of July the company requested the bankers not to proceed to an immediate sale, to which the bankers assented, and the two men remained in possession. On the 19th of July a petition was presented for winding-up the company; and on the 28th of July a winding-up order was made. By arrangement with the liquidator, the men went out of possession in October, and in November the bulk of the chattels was sold by the liquidator without prejudice to the rights of the bankers, and realized less than £5,000:

Held, by Bacon, V.C., that under the Judicature Act, 1873, s. 10, the rights of the parties were the same as in bankruptcy; that the attornment clause was intended to give the mortgagees a remedy in the event of bankruptcy, and was a fraud on the bankrupt laws; that, moreover, a seizure by a secured creditor by a distress not perfected by sale before the bankruptcy was void as against the general body of creditors; and that the proceeds of sale belonged to the liquidator:

5. *Held*, further, that the case came within the doctrine of reputed ownership.
6. *Held*, on appeal, that the attornment clause created the relation of landlord and tenant; that there being no ground for saying that the rent of £5,000 was so unreasonable as to be fraudulent, the mortgagees had the same rights of distress as any other landlord; and that, as the value of the chattels sold was less than one year's rent, on the mortgagees abandoning all claim to the chattels remaining unsold, the proceeds of sale must go to them.
7. *Held*, also, that the doctrine of reputed ownership had no application, as a distress does not make the landlord the owner of the goods distrained.
8. *Semble*, that where a mortgage contains an attornment clause the mortgagee is liable to wilful default in respect of the rent as being in possession.
Held, that the order of the Vice-Chancellor was not an interlocutory order; and that the proper notice of appeal was a fourteen days' notice; but a four days' notice having been given, the court allowed it to be amended.
9. The Court of Appeal has full discretion, under Rules of Court, 1875, Order LVIII, rule 3, to allow a notice of appeal to be amended as to dates or otherwise, and special circumstances are not required to justify such amendment.
Matter of Stockton, etc. 740

LAPSED LEGACY.

See LEGACY, 487.

LEGACIES.

1. T., on the marriage of his daughter in 1867, covenanted with the trustees of her settlement that his executors or administrators would, within twelve calendar months after his death if he survived his wife, but if she survived him, then within six calendar months after her death, transfer to the trustees £2,000 consols to be held on the trusts of the settlement, which were for such persons as the wife, with the consent of the trustees or trustee for the time being, should appoint, and in default of appointment in trust for the wife for life for her separate use, then for the husband for life, and after the decease of the survivor, for such children of the marriage as, being a son or sons, should attain twenty-one, or being a daughter or daughters, should attain that age or marry, and if more than one in equal shares, and in default of children for the husband absolutely. In 1871 T. satisfied this covenant to the extent of one moiety. In 1873 he made his will, bequeathing £2,800 to trustees in trust for the daughter for life for her separate use, without power of anticipation, and after her decease for such of her children as should attain twenty-one in equal shares:
Held, by the Master of the Rolls, that the bequest of the £2,800 was intended to be in satisfaction of the testator's liability under his covenant in the settlement, and that such of the parties interested under the settlement as were interested under the will were put to their election.
2. *Held*, on appeal, that there were such substantial differences between the provisions made by the settlement and by the will as to rebut the presumption against double portions.
3. Parol evidence of the intention of the parties is admissible to rebut the presumption against double portions, and there is no difference in this respect between the cases of a deed and a will.
Tussand v. Tussand. 176
4. The cases in which a lapsed share of real or personal estate will be the primary fund for payment of costs of administration, discussed. *Jones v. Caless.* 487

See CREDITORS, 594.
 REAL ESTATE, 601, 607 *note*.
 SET-OFF, 431.
 WILLS, 424, 473.

LEX LOCI

1. Where the Probate Division of the High Court of Justice had granted a general probate of the will of a Scotch testator, the Chancery Division made the ordinary decree for the administration of the personal estate of the testator without limiting it to the English assets, and notwithstanding the opposition of a majority of the executors. *Stirling-Maxwell v. Cartwright*. 10,

12 *note*.

LICENSE.

See MINES, 441.

LIEN.

See ATTORNEYS, 701.
 VENDOR'S LIEN, 192, 194 *note*.

LIFE ESTATE.

See FEE TAIL, 585.
 LANDLORD AND TENANT, 599, 601 *note*.
 REMAINDERMEN, 650.

LIMITATION OVER.

See WILLS, 406.

LIMITATIONS, STATUTE OF.

1. In 1858 the plaintiff and defendant entered into partnership transactions which came to a final termination in

1861, when the defendant admitted that £787 was due to the plaintiff, but he never subsequently made any admission of the debt, or promise to pay. The plaintiff brought an action for an account of the partnership dealings:

Held, that the Statute of Limitations could be set up on demurrer; and was a good defence to a claim for partnership accounts. *Noyes v. Crawley*. 478, 486 *note*.

See ATTORNEYS, 318, 326 *note*.
 LACHES, 17.

LUNATIC.

1. A liquidation petition cannot be signed by a next friend on behalf of a lunatic not so found by inquisition.
2. *Semble*, that, in the case of a lunatic so found by inquisition, the Court of Lunacy might have jurisdiction to direct that a liquidation petition should be signed on his behalf. *Matter of Cohen*. 606

See TRUSTS AND TRUSTEES, 537.

M.

MAINTENANCE.

See INFANTS, 772.

MARRIED WOMEN.

See PARTITION, 700.

MINES.

1. By a deed of grant and license the licensee was empowered to work and win the coal mines under certain lands, and, out of the profits to arise by the sale of the coals, to reimburse himself all expenses of the winning thereof; and after full payment of such expenses

of winning the coal mines the licensee was to pay the licensor a sum of money in respect of the coals raised as therein mentioned.

The licensee reached the coal mines by a driftway from an adjoining colliery, and worked the coal :

Held, that the coal was won, according to the meaning of the deed, on the day when it could be worked through the driftway, and that no expenses subsequently incurred could be included in the expenses of winning :

2. *Held*, that the expense of the driftway was to be paid out of the profits, though it had been used for the purposes of the adjoining colliery :
3. *Held*, that in estimating the profits out of which the expenses of winning were to be reimbursed, all the expenses of working and selling the coal, including bad debts, must be allowed. *Rokeby v. Elliot*. 441

MORTGAGE.

1. Where a mortgagor dies insolvent, and the mortgagee then realizes his security, and, after paying himself the mortgage debt out of the proceeds, has a surplus in his hands, he cannot retain that surplus in payment of a simple contract debt due to him from the mortgagor and so give himself a preference over the other creditors, but must hand it over to the mortgagor's legal personal representative as part of his estate; the mortgagee being merely in the position of a trustee of the surplus for the estate.
2. And if the mortgagee in such a case happens to be the executor of the mortgagor, still he cannot, under an executor's general right of retainer or preference, retain the surplus in payment of the simple contract debt, to the prejudice of a creditor of a higher degree, whether the debt is due to himself individually or to a partnership of which he happens to be a member.

3. A., having mortgaged certain life policies to B. & C., a firm of solicitors, to secure a bill of costs, died insolvent. B. & C. then received the policy moneys, and, after paying themselves their mortgage debt thereout, had a

surplus remaining in their hands. A.'s widow and executrix then filed a bill against B. & C. for accounts and payment of the surplus, and a decree was made directing the usual mortgagor and mortgagee accounts against B. & C., under which a balance was found due from them as mortgagees. After the decree A.'s executrix died, having appointed B. her executor, and the action was revived against B. & C., by substituting a judgment creditor of A. as plaintiff :

4. A summons by B. & C. to be allowed to retain the balance in payment of a simple contract debt due to them from A., was refused, with costs.
5. The principle of retainer or preference in the case of a mortgagee or executor, discussed. *Talbot v. Frere*. 848

See ASSIGNMENT, 25.
CORPORATIONS, 488.
PRESUMPTION, 25.
SALE, 523, 537 *note*.

MORTGAGE FORECLOSURE.

1. When a sale has been directed by the court, and the conduct of it given to one party, no other party has a right to interfere in any way in the sale without the leave of the court.
2. Thus, where the court directed a sale and gave the conduct of it to an independent solicitor, both plaintiff and defendant having liberty to bid, the plaintiff was restrained by injunction from issuing and circulating advertisements that the sale was about to take place. *Dean v. Wilson*. 576

MOTION.

1. A decree was made by consent ordering the defendant to give a bond for payment of a certain sum to the plaintiff, and to deposit certain shares as security. Subsequently a compromise was come to by which the plaintiff agreed to accept a smaller sum on the ground of the poverty of the defendant. The plaintiff afterwards moved to enforce the decree, notwithstanding the compromise, on the ground that he had

been induced to enter into the compromise by misrepresentation. In support of this it was shown that shortly before the compromise was signed the defendant's father, who was believed by all parties to be a man of property and had refused to assist the defendant, had died, which fact was known to the defendant's solicitor when the compromise was agreed to but was not known to the plaintiff's solicitor. The plaintiff's solicitor deposed that as "he was informed and believed" the defendant's father had died intestate, and the defendant had become entitled to a share of his estate, more than sufficient to meet all his liabilities. At the interview when the compromise was agreed to, the defendant's solicitor repeated the statement previously made as to the defendant's father having refused to assist him. An order having been made by Malins, V.C., giving the plaintiff leave to enforce the decree notwithstanding the compromise :

Held, on appeal, that the question whether the compromise was invalid ought to have been made the subject of a new action, and ought not to have been tried on a motion of this nature ; but that as the case had been argued on the merits in the court below without this objection being insisted on, the objection could not be taken in the Court of Appeal ; and the court being of opinion that the order was right on the merits, it was affirmed.

2. Upon a proceeding which, though interlocutory in form, finally decides the rights of the parties, evidence on information and belief is not admissible, and the party against whom it is adduced is not bound to contradict it ; but if in the court below he deals with the evidence as admissible, he may be precluded from objecting to it before the Court of Appeal. *Gilbert v. Erdean*. 92, 101 note.

See APPEAL, 450.

MUNICIPAL CORPORATIONS.

1. The owner of a house after having, in accordance with a by-law of the Local Government Board, left, on the 16th of October, a plan of an intended new building, the local board passed a reso-

lution that the plan was approved of, and that he should be offered £40 for certain land of his thrown into the street. He refused to accept the £40 but proceeded with his works, and by the 26th of October had pulled down the front wall of his house. On the 27th of October the board passed a resolution abandoning the terms before offered, and requiring him to set his frontage further back. This notice was given under sect. 155 of the Public Health Act, 1875, as on the front of a house having been pulled down. On the 27th of November the owner of the house proceeded with his building, and on the 21st of December he was served with notice to pull down his new building :

Held, that the local board having approved of a plan, and having allowed a house owner to proceed and pull down the front wall of his house, could not afterwards avail itself of the powers acquired when the front of a house has been taken down :

2. *Held*, that where a local board has not, during the month prescribed by the Public Health Act, s. 158, signified its disapproval of plans laid before it, it cannot afterwards object to the building according to the plan.
3. A local board cannot, under sect. 158, pull down a building without giving the owner an opportunity of showing cause why it should not be pulled down. *Masters v. Pontypool, etc.* 433
4. Municipal corporations having been reduced by the Municipal Corporations Act, 1835, from the position of owners of property to that of trustees, possess the ordinary right of trustees to defend their trust property and their rights as trustees from attack at the expense of the trust estate.
5. Consequently, a municipal corporation has the right, either under sect. 92 of the Municipal Corporations Act, 1835, or under the general law applicable to trustees, to defray, out of the borough funds or rates, the expenses of any attack made by bill in Parliament, whether against their existence as a corporation, or against their property, or only against their rights, powers, or privileges ; and that right is not taken away by the Municipal Cor-

porations (Borough Funds) Act, 1872.
Attorney-General v. Mayor of Brecon.
 626, 648 note.

N.

NAME.

1. There is nothing in the Companies Act, 1862, to affect the right of a company registered under a particular name to an injunction restraining another company which, notwithstanding the prohibition of sect. 20 against identity of names, has been registered under an identical or a similar name, from carrying on its business under that name, if it is proved that that name is calculated to deceive; the principles applicable to individuals trading under identical or similar names applying equally to companies. *Merchant, etc. v. Merchants, etc.* 889, 846 note.

See CHATTEL MORTGAGES, 786, 795.
 WILLS, 56.

NEGLIGENCE.

1. In order that an extraordinary natural event, such as a very high tide, should be, in the legal sense of the words, an act of God, it is not necessary that such an event should never have happened before; it is sufficient that its happening could not have been reasonably expected. If such an event has happened once, but there is nothing to lead to the inference that it is likely to recur, it does not, if it happens a second time, cease to be an act of God.
2. Where a defendant charged with negligence has been guilty of a breach of duty sufficient to produce the damage complained of, he cannot escape liability by showing that the same damage would have arisen from some other cause beyond his control if he had done his duty. But if he can show that some of the damage which actually happened arose from a cause beyond his control, the liability for damage will be apportioned.
3. A dock company were authorized by their special act to make and maintain a dock and works connected therewith according to the levels defined in certain plans and sections deposited with the clerk of the peace. The dock communicated with the River Thames by an artificial channel, through which the water was admitted. The sections showed the retaining bank of the dock and channel at an uniform height of four feet above Trinity high-water mark. The level of the surrounding country was some feet below Trinity high-water mark, the river being kept from overflowing by means of a river wall 4 ft. 2 in. above Trinity high-water mark. The company allowed their retaining bank to be at one point several inches below the level of four feet. In November, 1875, an extraordinarily high tide took place, and the river rose to 4 ft. 5 in. above Trinity high-water mark, in consequence of which the water in the dock overflowed the bank and damaged the property of a neighboring landowner. The tide had never been known to rise so high before, but in March, 1874, it had risen to four feet above Trinity high-water mark. On that occasion there was a small overflow from the dock, but no damage was done to the neighboring landowner. Previously to that the tide had never risen above 3 ft. 4 in., and the water had never overflowed from the dock:
Held, first, on the construction of the act, that the company were bound to keep their bank up to the level of four feet above Trinity high-water mark, and were liable to the plaintiffs for breach of their statutory duty in not doing so:
4. Secondly, that, independently of the act, the defendants were bound as riparian owners to keep the bank up to the level of 4 ft. 2 in., the height of the rest of the river wall, and that they were liable to the plaintiffs for negligence in not doing so:
5. Thirdly, that the extraordinary high tide of November, 1875, although an act of God, did not excuse the defendants from their liability; but that they ought to have an opportunity of showing that the damage done by the act of God and the damage done through their negligence ought to be apportioned. *Nitro-Phosphate, etc., v. London, etc.* 283, 306 note.

NEXT FRIEND.

See DISCOVERY, 654.

NOTICE.

1. *Semble*, in an action between principals and agents impeaching the agents' accounts, actual knowledge of antecedent fraud in the agents by one who subsequently became a member of the firm of the principals would not, if proved, be any bar to their claim. *Williamson v. Barbour*. 309

See ASSIGNMENT, 25.

PRESUMPTION, 25.

PRINCIPAL AND AGENT, 33, 45 *note*.

O.

OFFICERS.

See STOCKHOLDERS, 386, 392 *note*.

ORDINANCES.

See MUNICIPAL CORPORATIONS, 433.

P.

PARENT AND CHILD.

1. A Protestant on his marriage with a Roman Catholic lady promised that the children of the marriage should all be brought up as Roman Catholics. Soon after the birth of the first child he determined that they should be brought up as Protestants, to which determination he adhered. At the time of the proceedings there were three children, girls, aged respectively nine, eleven, and twelve. The mother, unknown to the father, and in spite of his express directions, had so indoctrinated them

with Roman Catholic views that ultimately they refused to go with their father to a Protestant place of worship. The father thereupon commenced an action in their names by himself as next friend, he being a co-plaintiff, to have them made wards of court, and took out a summons in the action for directions as to their education. The wife then presented a petition in the matter of the infants, and of the act 36 & 37 Vict. c. 12, with a view to their being brought up as Roman Catholics. Vice-Chancellor Malins dismissed the petition, and made an order on the summons declaring that the children ought to be brought up as members of the Church of England, and ought not to be taken to Roman Catholic places of worship, and restraining the mother from taking them to confession or to Roman Catholic places of worship without the consent of the father:

Held, on appeal, that the father had not forfeited his right to have the children brought up according to his own religious views, and that the court would aid him in enforcing that right, and that the injunction had been rightly granted:

2. But *held*, that the declaration ought to be omitted, leaving it to the father to do what he considered to be best for the temporal and spiritual welfare of the children.
3. The court refused to examine the children, considering that a stronger case was required to induce the court to interfere with a father than with a testamentary guardian. *Agar-Ellis v. Lascelles*. 494, 518 *note*.

PARTIES.

1. W., claiming to be one of the next of kin of an intestate, took out letters of administration to her estate, and divided the residue among the supposed next of kin, including himself. Afterwards W. died, and then the plaintiff, who claimed to be sole next of kin, and disputed the title of W. and the other supposed next of kin, brought a suit against W.'s executors, calling upon them to refund a fixed sum of money, which had been agreed on as the net

residue of the intestate's estate come to the hands of W. as administrator; and praying that so far as might be necessary the estate of the intestate might be administered by the court. The administrator *ad litem* of the intestate's estate left unadministered by W. was made a defendant to the suit:

Held (affirming the decision of Hall, V.C.), that although the only object of the suit was to establish the title of the plaintiff as sole next of kin, a general administrator of the intestate's estate was a necessary party to the suit, and not merely an administrator *ad litem*. *Dowdennell v. Dowdennell*. 120

2. On a petition under the Trustee Relief Act for payment out of court of a fund to which numerous parties were entitled, most of whom were not before the court, a former order having been made directing class inquiries, and the Chief Clerk having made his certificate, it was ordered that the petitioner be at liberty to serve a copy of the petition, the former order, and the Chief Clerk's certificate, together with the present order, upon the several persons named in the certificate, and that the petition stand over till such persons had been served. *Battersby's Trusts*. 649

See STOCKHOLDERS, 331, 338 note.

PARTITION.

1. In a partition action by a married woman and her husband, her request for sale may be made by her counsel authorized to act on her behalf. *Crookes v. Whitworth*. 700

PARTNERSHIP.

1. T., the managing partner of a colliery, received notice from L., an adjoining owner, that the workings were being carried on beyond the boundary. T. insisted that he was entitled to the disputed ground, and carried on his workings. An action was then commenced against him by L., and was referred to arbitration. T.'s partners were not informed of these proceedings till after the reference to arbitration had been

agreed to. They did not object to it, but treated it as a proceeding in which they were interested, and were present before the arbitrator. The arbitrator awarded that there had been a trespass, and assessed the damages at £8,000. The partners refusing to contribute, T. filed his bill to compel them to do so. The defendants set up the case that T. had wilfully and knowingly worked beyond the boundary. Bacon, V.C., considered that he had not worked beyond his boundary at all, but held him not entitled to contribution, on the ground that he had no authority to refer the dispute to arbitration without the assent of his partners, and that their subsequent assent was given in ignorance of material facts, and was not a sufficient ratification.

On appeal, the court was of opinion that the arbitration had been assented to, so as to make the arbitrator's award binding on the copartners as to the fact of trespass and the *quantum* of damages, but, being of opinion that the plaintiff, although he had not knowingly trespassed, had worked beyond the limits of the partnership colliery without proper inquiry as to the limits, and had acted with gross negligence and recklessness in continuing his workings after notice, and without consulting his partners, when it was evident that his right to work in the disputed area was extremely doubtful, and the profits to be expected from so doing very small:

Held, that the decision that the other partners were not liable to contribute ought to be affirmed:

2. *Held*, also, that as no additional costs had been occasioned by the allegation that the plaintiff had wilfully and knowingly trespassed, the plaintiff could not be relieved from any part of the costs on the ground of the failure of that allegation. *Thomas v. Atherton*. 609, 625 *note*.

See ACCOUNTS, 309, 327.

MINES, 441.

PRESUMPTION, 148, 151 note.

PAYMENTS.

1. A customer borrowed from his bankers £2,000, which was placed to the credit of his current account, and to

secure the debt gave them ten promissory notes payable at intervals of a week. At the same time a friend of the borrower wrote to the bankers as follows:

"You having this day at my request placed the sum of £2,000 to the credit of Mr. C.'s" (the borrower's) "account with you, in the event of his promissory notes and interest or any of them representing that amount not being paid at the due dates, I hereby undertake, upon demand, to secure payment of the same," by a mortgage of certain specified property.

On the first five due dates, the sums represented by the first five notes respectively, were debited by the bankers to the customer in the current account; and on each of the first two due dates enough cash was paid in to the account in the course of the day to liquidate the amount of the note. On the remaining three days the balance throughout the day was against the customer. The amounts of the last five notes were not entered by the bankers in the account at all. The payments in to the credit of C. to his current account and to another special account after the last note became due, were sufficient to cover all debits up to and including the last note; but the accounts were during all this time overdrawn:

Held, that the bankers were bound to apply all moneys paid in first to the notes secured by the surety which had fallen due; and that the debt was, moreover, discharged, on the principle of *Clayton's Case*. *Kinnaird v. Webster*, 579

See PRINCIPAL AND AGENT, 33, 45 note.

PERSONAL ESTATE.

See REAL ESTATE, 601, 607 note.

PETITION.

1. Applications for payment out of court of a fund paid in under the Trustee Relief Act must be made by petition and not by action; and a person not named in the trustee's affidavit may pe-

tition for payment out of court. But where an action has been brought the court may make a declaration of right, leaving the payment to be obtained on petition. *Pelling v. Goddard*. 25

See BANKRUPTCY, 539.

PLEADINGS.

1. In an action against a lessee to set aside a lease granted under a power, the statement of claim stated that the donee of the power had received a specified sum as a bribe, and stated the circumstances; the statement of defence denied that that particular sum had been given and denied each circumstance, but contained no general denial of a bribe having been given. *Fry, J.*, having held that the denial was evasive, and amounted to an admission that some bribe had been given, and having refused leave to amend the statement of defence:

Held, by the Court of Appeal, that leave to amend the statement of defence ought to be given.

2. *Per BRAMWELL, L.J.*: As a general rule leave to amend ought not to be refused unless the court is satisfied that the party applying is acting *mala fide*, or that his blunder has done some injury to the other side which cannot be compensated by payment of costs or otherwise.
3. Whether the defendant ought on the pleadings to be held to have admitted the acceptance of some bribe, *quære*. *Tildestley v. Harper*. 782

See LIMITATIONS, STATUTE OF, 478, 486 note.

POWERS.

1. The donee of a power to appoint a fund in favor of her own issue, "such issue to be born before any such appointment," by deed, after reciting the power and her desire to exercise it, and the state of her family, appointed the fund to her daughter for life, and after the daughter's death to the daughter's

children in equal shares on their respectively attaining twenty-one, but if any of such children should die under twenty-one leaving issue, the share of the child so dying was to go to such issue, to vest at twenty-one.

At the date of the appointment the daughter had three children living (including one *en ventre sa mère*), and she had three born afterwards. One of the children had attained twenty-one, and the rest were minors :

Held, first, that issue in existence at the date of the deed of appointment were the only objects of the power. Secondly, that upon the construction of the deed the intention of the appointor was to include non-objects, i.e., issue born after that date. Thirdly, that the appointment was not thereby bad *in toto*; but that, fourthly, the share of each object would be determined by the total number of objects and non-objects who should fall within the class in whose favor the appointment purported to be made.

2. Under the circumstances, one-sixth of the fund in court directed to be at once paid out to the child who had attained twenty-one, and the remainder to remain in court, and the dividends thereon to be accumulated. *Matter of Farncombe*. 411

PRACTICE.

See APPEALS.

COSTS.

SECURITY FOR COSTS.

PRECATORY TRUSTS.

See POWERS, 411.

PREFERENCE.

See GOVERNMENT, 252, 265 note.

PRESUMPTION.

1. The presumption that a solicitor has communicated to his client facts which

he ought to have made known cannot be rebutted by proof that it was the solicitor's interest to conceal the facts. *Bradley v. Riches*. 25

2. Where no share qualification is necessary, the mere fact of acting as a director of the company, and of attendance at meetings in that character, is not enough to fix a man with knowledge that his name has been entered on the share register, and with consequent liability, if he neither applied for shares nor received any notice of allotment.
3. There is no presumption of law that a director knows the contents of the books of the company. *Hallmark's Case*. 148, 151 note.
4. The court refused to treat a woman as past child-bearing whose age was fifty-four and six months and had never had any children, but had only been married three years. *Croxson v. May*. 195, 196 note.

PRINCIPAL AND AGENT.

1. Four executors holding stock in their name directed their solicitor to sell the stock. The solicitor, in the name of his firm, gave to a stockbroker whom the solicitor had employed in stock exchange speculations directions to sell the stock. The stock was sold by the broker, and the solicitor returned to the stockbroker transfers of the stock, with receipts indorsed, signed by the four executors. The sale was completed, and the stockbroker sent to the solicitor a check for part of the purchase-money for the shares, and carried the balance on the transaction to the credit of the solicitor in the account between them, which account was afterwards settled by a payment made to the stockbroker :

Held, that, under the circumstance, the stockbroker must be held to have had notice that the shares were not the property of the solicitor, and that, though the solicitor had from the executors authority to receive the purchase-money, payment to him, by giving him credit in an account between them, was not sufficient to discharge the stockbroker, who remained liable to the executors for the balance.

2. The sale was made subject to the rules of the Stock Exchange, and the stock-broker alleged that by those rules the broker could recognize only the person employing him, and obey his directions as to the disposal of the proceeds of a sale :

Held, that the rules of the Stock Exchange applied only to the sale on the Stock Exchange, and not to subsequent transactions.

3. *Held*, also, that no such rule or custom was proved, and that no such rule or custom could be upheld. *Pearson v. Scott*. 38, 45 *note*.

See ACCOUNTS, 309, 327.
ASSIGNMENT, 25.
PRESUMPTION, 25.

PRINCIPAL AND SURETY.

See PAYMENTS, 579.

PROFITS.

See MINES, 441.

R.

RAILWAY COMPANY.

See EMINENT DOMAIN, 576.

RATIFICATION.

See ACCOUNTS, 309, 327.

REAL ESTATE.

1. Where personal estate is bequeathed upon trusts for conversion into land to be held on trusts which ultimately fail, land purchased before the failure of the

trusts goes to the next of kin as real estate. *Curtis v. Wormald*. 601, 607 *note*.

See EMINENT DOMAIN, 394, 404 *note*.
PERSONAL ESTATE.
STOCKHOLDERS, 153.

RECEIVER.

1. A creditor, who had recovered judgment in an action in the Chancery Division for payment of a sum of money, sued out an *elegit* against his debtor, whose only interest in land was an equity of redemption in fee. The creditor then commenced an action in the Chancery Division, claiming to have it declared that he was entitled to a charge on the land, and to have such charge enforced by sale, foreclosure, delivery in execution, or otherwise as the court might direct, and asking for a receiver. The plaintiff then moved for a receiver in the new action.

Held, by Hall, V.C., and by the Court of Appeal, that the statute 27 & 28 Vict. c. 112, s. 1, did not take away the old right which a judgment creditor had before the statute 1 & 2 Vict. c. 110, to take proceedings in equity to obtain the benefit of a judgment which there were legal impediments to his enforcing at law, and that the plaintiff was not obliged to wait till the trial, but might obtain a receiver on interlocutory application in the new action.

2. Whether the appointment of a receiver could have been obtained in the old action, *quære*.
3. Discussion of the powers given to the court of appointing receivers by Judicature Act, 1873, s. 25, subs. 8. *Anglo-Italian Bank v. Davies*. 103
4. When collusive appointment of one does not prevent appointment of another. *Matter of British, etc.* 405
5. Plaintiff in action, which had been followed by a cross-action, obtained an order in both actions that his costs of the cross-action should be paid by the defendant in the action, a married woman, entitled for life, for her separate use, to the dividends of a sum of stock, standing in the names of trus-

tees, who were not parties to either action. Plaintiff had endeavored to obtain a sequestration, but failed from not being able to find the defendant's address so as to serve the subpoena for costs. He then moved the court for a receiver, under sect. 25, subs. 8 of the Judicature Act, 1873. After service of the notice of motion, but before the motion was heard, the defendant made an affidavit, in which her address was set forth:

Held, that the principle of *Anglo-Italian Bank v. Davies* applied, and that the plaintiff was entitled to a receiver; and order made on the hearing of the motion accordingly. *Bryant v. Bull.* 591

6. An official liquidator had been appointed in chambers. Upon motion made on behalf of a very large majority of the unsecured creditors of the company, who alone were interested in the realization of the assets, two creditors were appointed liquidators instead of the liquidator already appointed. *Matter of Land Financiers.* 685

See BANKRUPTCY, 55.
CORPORATIONS, 488.
MORTGAGE FORECLOSURE, 576.
STOCKHOLDERS, 562, 573 note.

REMAINDERMEN.

1. Testator, being entitled in fee to a settled estate, subject to a shifting clause in favor of A. in the event of testator's children dying without issue under twenty-one, and being also seised in fee of another property adjoining and partly intermingled with the settled estate, devised all his real estate to trustees in trust for sale. Testator left four children, the eldest being twelve years old. The trustees presented a petition under the Settled Estates Act, 1877 (40 & 41 Vict. c. 18), for the sale of the two properties together and the apportionment of the purchase-money. A. opposed the sale:

Held, that A.'s interest was too remote to be considered, and the court being satisfied on the evidence that the proposed sale would be more advantageous than if the properties were sold separately, the same was ordered accordingly. *Spurway's Estate.* 650

RENT.

1. When assignee, executor, administrator, trustee, etc., liable for, and when not. *Ex parte Dressler.* 84, 90 note.

See FIXTURES, 543, 554 note.

RES ADJUDICATA.

See BANKRUPTCY, 452.
EXECUTORS AND ADMINISTRATORS, 767.
FRAUD, 731.

S.

SALE.

1. R., on the 29th of November, 1877, entered into an agreement with C. & Co. to hire some furniture from them, which was admitted to be of the value of £68. R. was to pay C. & Co. £10 on the signing of the agreement, £5 on the 4th of January then next, and £5 on the 4th of each succeeding month during the continuance of the agreement, and he was also on the signing of the agreement to deposit with C. & Co. promissory notes for the total amount of the instalments as collateral security, and without prejudice to their title to the furniture and to their rights under the agreement. In case of the furniture being seized by them under the agreement, the notes, or so many of them as should then be current, were to become void. In the event of non-payment of any of the notes when due C. & Co. might seize, remove, and retake possession of the furniture as in their first and former estate, notwithstanding any payments made by R., which payments were then to be forfeited to C. & Co. Upon payment by R. to C. & Co. of the full amount of £66 by the above instalments the furniture was to become his property, but, until the whole of that sum had been paid, the furniture was to remain the sole property of C. & Co., and was only let on hire to R.

The furniture was delivered to R. and he gave the promissory notes. On the 9th of January, 1878, he filed a liquida-

tion petition, under which a trustee was appointed, who took possession of the furniture, which was then in R.'s house. On the 19th of March, some of the monthly instalments being over due C. & Co. seized the furniture:

Held (reversing the decision of the Registrar), that the property in the furniture did not pass to R. until payment of the full amount of the instalments, and that consequently the agreement did not amount to a bill of sale by R., and did not require registration. *Matter of Crawcour.* 206, 210 note.

2. C., on the 18th of July, advanced W., who had then an execution in his house, £150, which was employed partly in paying out the execution. An inventory was made of W.'s furniture, and at the foot of it W. signed a receipt for the £150, as "for the absolute sale" to C. "of the above-mentioned articles." On the same day a written agreement was entered into between C. and W. for the letting of the same furniture (specified in a schedule) by C. to W. for two months for £170, to be paid by W. to C. on the 18th of September, or such other time as might be agreed on. The agreement gave C. power, in case the £170 should not be duly paid, or if at any time during the continuance of the agreement the goods should be taken under an execution or distress, or W. should become bankrupt or take proceedings for liquidation of his affairs or composition, or on the happening of some other specified events, to determine the agreement, and thereupon to take possession of the goods and to sell them. If upon a sale he should realize more than what was due to him under the agreement and his expenses, he was to pay the surplus to W.; if he should realize less, W. was to make good the deficiency. On the payment of the £170 and expenses the goods were to become the property of W.:

Held, that these two documents together constituted a mortgage to secure £170, and that they required registration under the Bills of Sale Act, 1854.

3. In August W. repaid C. £50, part of the £170. The balance of £120 was not paid when it became due on the 18th of September, and C. sent H. to take possession of the goods. Possession was taken, and it was then arranged that H. should pay the £120 to C. C. signed

a receipt (indorsed on the hiring agreement of the 18th of July) and dated the 22d of September, for the £120 as "for the absolute sale" to H. of "the goods herein specified," and on the same day an agreement (similar to that of the 18th of July) was entered into between H. and W. for the letting of the furniture to W. for three months at a rent of £145, to be paid in three instalments in October, November, and December. The October instalment was not paid when it became due, and on the 6th of November H. took formal possession of the goods. But the goods remained in the apparent possession of W. until after he had committed an act of bankruptcy, upon which he was ultimately adjudicated a bankrupt. None of the documents was registered under the Bills of Sale Act:

Held, that, whether the transaction in September was a transfer to H. of C.'s interest as a mortgagee or an entirely new transaction, H. could stand in no better position than C. did, and that the trustee in the bankruptcy was entitled to the goods. *Matter of Odell.* 523, 537 note.

4. If management of, given to one party, other cannot advertise. *Dean v. Wilson.* 576

SATISFACTION.

See LEGACIES, 176.

SECURITY FOR COSTS.

1. The plaintiff, who was in receipt of parochial relief, having appealed from this refusal, was ordered by the Court of Appeal to give security for the costs of the appeal, the court being of opinion that the appeal was a speculative one.
2. *Per* CORRON, L.J.: The insolvency of an appellant is, *prima facie*, a sufficient reason for ordering him to give security for costs. *Hankin v. Turner.* 767
3. A defendant in an action which had been tried by a judge without a jury gave notice of appeal against the judg-

ment, and also obtained *ex parte* a rule nisi for a new trial. He did not set down the appeal for hearing, but, before the argument of the rule for a new trial, gave fresh notice of appeal from the judgment. There was a substantial question to be tried as to the measure of damages. The appellant being in insolvent circumstances, the plaintiff moved for security for costs :

Held, first, that the plaintiff was entitled to the costs of the first notice of appeal as an abandoned motion :

4. Secondly, that the second notice of appeal was unnecessary, inasmuch as the whole question could be tried under Rules of Court, 1875, Order XI, rule 10, upon the application to make the rule for a new trial absolute; and the appellant was therefore ordered to give security for costs. *Waddell v. Blockey*. 803
5. D. & C., who traded in partnership, filed a liquidation petition on the 4th of December, 1876. On the 19th of December the creditors resolved on a liquidation by arrangement, appointed B. trustee, with a committee of inspection, and resolved that the debtors' discharge should be granted upon the committee of inspection and the trustee certifying that they were entitled to it. On the 8d of January the committee resolved that C. should be allowed to realize the stock-in-trade and to collect the debts due to the estate, under the supervision of the committee, for six months from that day, the committee receiving the proceeds; that, if 7s. 6d. in the pound and the costs of the liquidation were thus realized, a further 7s. 6d. in the pound should be accepted from C. for the remainder of the estate, if it was paid within three months; that D. should be allowed his discharge, subject to the payment of his private debts, and that C. should have his discharge on payment of the 15s. C. realized the stock-in-trade and the debts, and out of the proceeds paid £719 to the committee, and £60 to the trustee for his costs of the liquidation. The £719 was not enough to pay the first 7s. 6d., but that was in fact paid soon after it became due to all the creditors who had proved. There were only eight of them. The debtors' bankers, to whom they owed £251 at the commencement of the liquidation, did not

prove, because they were amply secured by a mortgage of real estate of C., which he had executed in favor of the bank in February, 1876, to secure moneys advanced by them to him or to his firm. In February, 1877, C. commenced trading again alone. Seven of the old creditors dealt with him again and gave him credit. Before he recommenced business he applied to the bank to give him credit on the security of the mortgage. The bank manager had an interview with the trustee, and asked him whether the bank might not safely deal with C. The trustee told him that the matter was quite out of his hands, and that it would be all right. The bank then agreed to give C. fresh credit. The second instalment of 7s. 6d. was not paid when it became due. The creditors applied for payment to C., not to the trustee, but did not take any steps to enforce payment. Ultimately C. paid the second instalment to one of the creditors and part of it to some of the others, making the payment in part by means of checks on the bank. In July, 1877, the mortgaged property was sold by C., with the consent of the bank, for £1,180, which was paid to the bank and carried to the credit of C.'s account. In August, 1877, he was adjudicated a bankrupt. At the end of July, 1877, the trustee's solicitor had claimed the £1,180 from the bank. After the adjudication the trustee in the liquidation applied to the county court for an order that the bank should pay the £1,180 to him. The judge ordered the bank to pay over the balance, after deducting the debt due to them by the firm of D. & C. and the advances made by them to C. after the date of the liquidation petition :

Held, by Bacon, C.J., and by the Court of Appeal, that, having regard to the representations made by the trustee to the bank, and the conduct of the creditors, the bank were entitled to retain out of the purchase-money the advances which they had made to C. since the filing of the liquidation petition.

6. *Per BAGGALLAY, L.J.* : Upon the principle of *Troughton v. Gilley*, the representations made by the trustee would of themselves have been sufficient to give the bank the right which they claimed.

7. *Per* BRAMWELL, L.J.: The principle of *Troughton v. Gilley* did not apply. *Matter of Bolland*. 132, 140 note.

8. Where a limited company is in voluntary liquidation, a contributory cannot set off a debt due to him from the company against calls made against him either by the company before or by the liquidator after the resolution to wind up. *Matter of Whitehouse*. 372, 383 note.

9. A week before the death of a testatrix, a debtor to her, who was one of the residuary legatees under her will, dated several years previously, became bankrupt. The debt was never proved by the testatrix in her lifetime or by her executors after her death, nor had any dividend been declared in the bankruptcy.

Held (following *Cherry v. Boulbee*), that the executors of the testatrix were not entitled to set off or retain the amount of the debt due to the testatrix against the share of the bankrupt; nor, under the circumstances, any amount in respect of dividend on such debt. *Matter of Hodgson*. 431

See COUNTER-CLAIM, 761.

PRINCIPAL AND AGENT, 33, 45 note.

SOVEREIGN.

1. The court has no jurisdiction to prevent a foreign sovereign from removing his property in this country.
2. A foreign sovereign who, for the purpose of obtaining his property, submits to be made a defendant in an action, does not thereby lose his rights.
3. There is a right of property in an article made in infringement of a patent although the court would order the article to be destroyed.
4. A foreign sovereign bought in Germany shells made there, but said to be infringements of an English patent. They were brought to this country in order to be put on board a ship of war belonging to the foreign sovereign, and the patentee obtained an injunction against the agents of the foreign sovereign and the persons in whose custody

the shells were, restraining them from removing the shells. The foreign sovereign then applied to be, and was made, a defendant to the suit. An order was then made by the Master of the Rolls, and affirmed on appeal, that notwithstanding the injunction he should be at liberty to remove the shells. *Vavasseur v. Krupp*. 166

SPECIFIC PERFORMANCE.

1. In defence to an action for specific performance of a contract as expressed in a document stated by the plaintiffs, the defendant pleaded that the document did not contain the true terms for the purchase, but he did not state what the true terms were. The defendant afterwards produced a written agreement for purchase containing terms differing from those in the document stated by the plaintiffs. The plaintiffs amended their statement of claim, but continued to claim specific performance of the contract as stated by them:

Held, that, the plaintiffs asking at the trial to have specific performance with a variation according to the terms of the agreement produced by the defendant, the action would not be dismissed, but judgment would be given for specific performance with the variation.

2. Where personal considerations enter into a contract, error as to the person with whom the contract is made annuls the contract; not so where the person sought to be bound would have been equally willing to make the same contract with any other person. *Smith v. Wheatcroft*. 64, 71 note.
3. Where two persons agreed to sell property, of whom one was entitled to a moiety subject to a mortgage for its full value, and the other had no interest: *Held*, that a judgment for specific performance with abatement might be made against the former. *Horrocks v. Rigby*. 20, 24 note.

STATE.

See GOVERNMENT, 252, 265 note.

STAY.

See CONSOLIDATION OF ACTIONS, 243,
249 note.

STENOGRAPHER.

1. On the hearing of an application before Vice-Chancellor Malins, the solicitors of the plaintiff and defendant agreed that a shorthand writer should be employed at the joint expense of the plaintiff and defendant to take notes of the proceedings. An order was made in favor of the defendant, from which the plaintiff appealed, and the Court of Appeal dismissed the appeal with costs, nothing being said about the shorthand writer's notes. The Taxing Master, in taxing the defendant's costs of the appeal, disallowed the costs of copies of the shorthand notes, except those of the judgment of the Vice-Chancellor, and also disallowed the sum paid by the defendant to the shorthand writer :

Held, by Vice-Chancellor Malins, that both the above items ought to be allowed :

2. *Held*, by the Court of Appeal, that the Taxing Master could not allow these items without a special direction from the court, and that as the Court of Appeal in dismissing the appeal had not given any directions as to them, they could not be allowed, and that the agreement between the solicitors did not make any difference in the case. *Ashworth v. Outram*. 265, 268 note.

See COSTS, 81, 715.

STOCKBROKER.

See PRINCIPAL AND AGENT, 33, 45 note.

STOCK EXCHANGE.

See PRINCIPAL AND AGENT, 33, 45 note.

STOCKHOLDERS.

1. M., at the request of A., who afterwards repudiated the ownership in

them, and alleged that it was in H., agreed that shares in a company, subsequently ordered to be wound up, might be registered in his name as trustee. The shares were afterwards transferred to W., and in the liquidation M. was placed in the B list of contributories, and was required to pay the call made. M. in 1876 assigned to the company all right to be indemnified by A. and H., and under the power in the deed to sue in his name the liquidator, with the sanction of the court, brought an action in M.'s name against A. and H., to recover what was due on the shares, and for a declaration that they or one of them were or was bound to indemnify M. against all liability. Issue was joined in November, 1877. On an application by the liquidator under the 115th section of the Companies Act, 1862 :

Held, that A. was a person liable to be summoned, as being capable of giving information in reference to the assets of the company, and that he must attend before the special examiner to be examined and answer all relevant questions. *Massey v. Allen*. 6

2. Three directors, who had not paid or been called upon to pay anything on their shares, made themselves liable on their personal guarantee for money advanced to the company by a bank. The company being in difficulties, and the bank having recovered judgment against the guarantors, a resolution was passed by the board of directors that in order to reduce the debt due to the bank the directors be recommended to pay in advance the amount of their shares. The three directors subsequently paid a sum equal to the amount of their shares, which was carried to the credit of the company at the bank. Two days afterwards a petition was presented on which an order for winding up was made :

Held (reversing the decision of Bacon, V.C.), that the three directors were guilty of no breach of trust or duty to the company in paying up their shares in order to relieve themselves of their personal liability to the bank; that the payment was a valid payment on account of the shares; and that the shares must be treated as paid up shares. *Poole's Case*. 142

3. *Held*, by the Court of Appeal, reversing the decision of Hall, V.C., that de-

- benture stock created under the provisions of the Companies Clauses Act, 1863 (26 & 27 Vict. c. 118), Part III, does not give the holder an interest in land within the meaning of 9 Geo. 2, c. 36, and may therefore be given by will for charitable purposes.
4. And, *semble*, the same rule applies to debentures as to debenture stock. *Attres v. Howe*. 158
 5. In an action against a corporation, where an officer of the corporation against whom no relief was claimed was made a defendant for the purpose of discovery:
Held, on motion, that, inasmuch as under Rules of Court, 1875, Order xxxi, r. 4, such discovery could be obtained by an order to deliver to him interrogatories, he was improperly joined as defendant, and that, under Order xvi, r. 14, his name should be struck out.
 6. In a representative action by a plaintiff on behalf of himself and all other bondholders:
Held, on motion, that a dissentient bondholder—it not appearing that there were any others who dissented—should be added as a defendant, but not in a representative character.
 7. Such applications should, in general, be by summons in chambers.
 8. In an interlocutory application with which some of the parties to the action who had no interest in such application were not served, an order *nisi* was made to be binding on the absent parties three days after service unless they showed cause. *Wilson v. Church*. 331, 338 note.
 9. A director of a company can, if qualified, sustain an action in his own name against the other directors, on the ground of individual injury to himself, for an injunction to restrain them from wrongfully excluding him from acting as a director.
 10. Where the articles of association of a company provided that no person should be eligible as a director unless he held "as registered member in his own right capital of the nominal value of £500 at least":
Held, that beneficial ownership was not necessary for a qualification, and that a registered holder of the required capital, though he had transferred his shares to another, was properly eligible. *Pulbrook v. Richmond, etc.* 386, 392 note.
 11. The powers of a liquidator of a limited company are more extensive than those of the company prior to the winding-up order: for instance, he can assert as against the members of the company rights which the company itself could not have asserted.
 12. *Dictum* of Lord Hatherley in *Waterhouse v. Jamieson* approved of.
 13. Under sect. 165 of the Companies Act, 1862, either the liquidator, or a creditor, or a contributory of a limited company in course of being wound up, may apply to the court for an order to compel a director to repay moneys of the company misapplied by him; and if the liquidator makes such an application, it is unnecessary to consider whether he does so as representing the company or as representing the creditors, he having, upon the literal construction of the section, an independent right to apply in a proper case.
 14. The creditors of a limited company are entitled, by virtue of a contract between themselves and the company, to be implied if not expressed, to have the capital of the company reserved for payment of their claims; consequently, the repayment by the directors to the shareholders of the whole or any part of the capital, either in the form of interest on share warrants issued under the Companies Act, 1867, s. 27, or otherwise, and whether such repayment be made with the sanction of the shareholders or not, is, unless such repayment be expressly authorized by the articles of association, *ultra vires* and a breach of trust; and if the company be ordered to be wound up the court will, upon an application either by the liquidator or by a creditor, under sect. 165 of the Companies Act, 1862, order the directors jointly and severally to make good the amount of capital so repaid, but, in case the repayment has been made with the sanction of the shareholders, without prejudice to the right of the directors to recover the amount from the shareholders.
 15. The articles of association of a limited insurance company provided (122) that

"the directors might, without the sanction of a general meeting, pay interest at the rate of 5 per cent. per annum upon the paid-up capital."

16. The company, desiring to raise further capital, passed a resolution empowering the directors, under the Companies Act, 1867, s. 27, to issue to members who had paid up the full amount of their shares, share warrants payable to bearer. Share warrants were issued accordingly, each warrant declaring that the bearer was entitled to interest at 5 per cent. per annum on the amount therein specified.

17. The company never having made any profits, the interest on the warrants was from time to time paid to the holders of them out of capital by the directors with the express sanction of the general body of shareholders, and on the assumption that such payment was authorized by article 122.

18. The company having been ordered to be wound up, the liquidator applied by summons under sect. 165 of the Companies Act, 1862, that the directors might be ordered jointly and severally to pay to him the amount so paid for interest to the holders of the share warrants:

Held (1) that upon the literal construction of sect. 165 the liquidator was entitled to make the application, independently of the question whether he, as representing the company, could sue its own agents, or whether he had an independent right to represent the creditors:

(2) That the directors had, in making payments to shareholders out of capital, acted *ultra vires* and committed a breach of trust, and that they were therefore liable jointly and severally to make good the amount of such payments, but without prejudice to their right to recover from each shareholder the amount of capital he had received. *Matter of National Fund Assurance Co.* 562, 573 note.

See PRESUMPTION, 148, 151 note.

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T.

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TITLE.

See EMINENT DOMAIN, 394, 404 note.

TRADE-MARK.

1. An arrangement was made between W., R., and G., that W., a manufacturer, should consign cotton cloths to G. in Rangoon, paying him an inclusive commission. The goods were to be exported through R., who acted as shipping agent, and was to see to the goods being finished and packed, for which services he received a commission from G. A particular mark was by arrangement between the three parties adopted for the goods, of which some portions and the general arrangement were new, and other portions consisted of R.'s name and arms, and of a symbol which had formerly been used by G. After goods had been regularly exported for some years under this arrangement, W. ceased to send goods through R., and commenced exporting them to Rangoon through the agency of F., continuing to use the old mark, except that the name and arms of F. were substituted for those of R. At the same time R. commenced exporting other goods under the old mark.

Cross actions were commenced for injunctions, in which R. set up an alleged custom in Manchester, giving the right

to the trade-marks to the shipping agent :

Held, upon the evidence, that no such custom existed.

2. *Held*, also, that neither R. nor W. had any exclusive right to the use of the mark, and that both actions must be dismissed. *Robinson v. Finlay*. 269

See NAME, 339, 346 *note*.

TRADE NAME.

1. The plaintiffs alleged in their statement of claim that their house had been called "Ashford Lodge" for sixty years, and the adjoining house belonging to the defendant had been called "Ashford Villa" for forty years, and that the defendant had recently altered the name of his house to that of the plaintiffs' house. The plaintiffs alleged that this act of the defendant had caused them great inconvenience and annoyance, and had materially diminished the value of their property, and they claimed an injunction to restrain the defendant from continuing to use the name of their house:

Held (overruling the decision of *Malins, V.C.*), that the alleged act of the defendant in calling his house by the name of the plaintiffs' house was not a violation of any legal right of the plaintiffs: and there being no allegation of malicious intention, a demurrer to the statement of claim was allowed.

2. *Seem*, no change has been made by the Judicature Act, 1873, s. 25, subs. 8, in the principle on which the court grants injunctions. *Day v. Brownrigg*. 708

TRUSTS AND TRUSTEES.

1. Bequest to the incumbent for the time being of U. of £500, the income to be applied, when necessary, in keeping in repair the grave and the railing and tombstone of A., and the remainder of such income to be applied in providing wine and bread for the sick poor of U., with a gift of the residue to the executor in trust for B. The executor paid

the legacy into court under the Trustee Relief Act. On petition by the incumbent :

Held, that the first purpose of the gift being invalid, the whole of the income was applicable to the charity; and that the sum should be paid to the official charity trustees to invest and pay the income to the incumbent of U. for the time being to be applied by him for the sick poor of the parish, as in the will directed: the executor's costs not to be allowed out of the fund, though he might take it out of the residue.

2. *Seem*, under the present practice, when it is doubtful to whom a legacy is payable, the better course is not by payment into court under the Trustee Relief Act, but by an administration summons, waiving accounts, simply for the purpose of obtaining the decision of the judge, or, after taking out such summons, where both parties agree, by submitting a statement of facts in the nature of a special case for the opinion of the judge.

3. If the executor does pay it in, he will be left to take his costs out of the residuary estate, and will not have them out of the legacy. *Matter of Birkett*. 354

4. A trustee with a beneficial interest in the trust estate is not a "bare trustee" within the Land Transfer Act, 1875, s. 48.

5. Thus a vendor of freeholds who let the purchaser into possession before payment of the purchase-money and execution of the conveyance was, by reason of his having a lien on the property for his purchase-money and not being bound to convey until payment, held not to be a "bare trustee" within the act, so that, upon his death, the money still remaining unpaid and the conveyance unexecuted, the legal estate passed to his heir-at-law.

6. *Quere*, whether a trustee without a beneficial interest in the trust estate, but having active duties to perform in relation thereto, is a "bare trustee" within the act. *Morgan v. Swansea, &c.*, 360, 364 *note*.

7. Order xvi, rule 7, of the Rules of Court, 1875, enabling trustees to represent their beneficiaries in an action, ap-

- plies to an action under the Partition Acts, 1868 and 1876. *Simpson v. Denny.* 476
8. A petition for the appointment of new trustees and for a vesting order, where the existing sole trustee is of unsound mind and out of the jurisdiction, need not be presented in Lunacy as well as in Chancery. *Matter of Gardner's Trusts.* 476
9. The sole surviving trustee of a sum of stock under a settlement having become of unsound mind, the persons beneficially entitled presented a petition in Lunacy for an order vesting in them the right to transfer the stock and receive the dividends:
Held, that such an order ought not to be made, as it would be administering the trust in Lunacy; but, on the petition being amended and intituled in the Chancery Division as well as in Lunacy, an order was made appointing the petitioners trustees of the settlement, and vesting in them, as such, the right to transfer the stock and receive the dividends. *Matter of Currie.* 537
10. Where in a marriage settlement the trustees had power to apply the income of the settled fund for the benefit of the husband and wife and their children as they should "in their uncontrolled and irresponsible discretion think proper," the court, while expressing an opinion that the trustees were not acting judiciously, declined to interfere with their discretion, there being no proof of *mala fides*. *Tabor v. Brooks.* 685, 690 note.
11. The policy of the Debtors Acts, 1869 and 1878, in leaving a defaulting trustee exposed to the penalty of imprisonment is not vindictive; the object of the penalty is simply to produce payment of the money.
12. Where it is shown that imprisonment of a defaulting trustee will not be productive of payment, the court, in the exercise of the discretion given by the Debtors Act, 1878, will refuse an application for a writ of attachment. *Barrett v. Hammond.* 696
13. A bankrupt who has obtained his discharge and who has become entitled to the surplus of his estate, all the creditors having been paid in full, is not
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- entitled, under the 39th section of the Solicitors Act (6 & 7 Vict. c. 73), to obtain the taxation of a bill of costs paid by the trustee in the bankruptcy.
14. The trustee in bankruptcy does not stand in the position of a trustee for the bankrupt. *Matter of Leadbitter.* 781
- See FIXTURES, 543, 554 note.
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- VENDOR'S LIEN.
1. Where the unpaid vendor of land taken by a railway company has com-

menced an action against the company to enforce his lien, the court will not grant an injunction or a receiver against the company before judgment has been obtained in the action, even though the company admit their liability. *Latimer v. Aylesbury, etc.* 192, 194 note.

VENDOR AND VENDEE.

1. A purchaser made the following requisition, "Is there to the knowledge of the vendors or their solicitors any settlement, deed, fact, omission, or any incumbrance affecting the property not disclosed by the abstract?"

Held, by Hall, V.C., on an application under the Vendor and Purchaser Act, 1874, that the vendor's solicitors must make a complete answer to the requisition and order made on them accordingly.

2. *Held*, on appeal, that neither the vendors nor their solicitors were bound to answer any part of the requisition. *Ford v. Hill.* 761

W.

WATER AND WATERCOURSES.

See NEGLIGENCE, 283, 306 note.

WILLS.

1. A testatrix bequeathed a newspaper to trustees upon trust to continue the publication thereof as long as they thought fit, and to pay one-fourth share of the net profits to J. C. during his life, and after his death to his widow during her life; and the testatrix declared that no person entitled to participate in the profits should have any right to interfere in the management of the publication or the mode or time of ascertaining and dividing the profits thereof, but the same should be wholly in the discretion of the trustees, except that

they should every January draw up a balance-sheet showing the net profits during the year ending on the then preceding 31st of December.

The trustees carried on the paper, gave notice to J. C. and the other beneficiaries that they intended, until further notice, to divide the net accrued profits half-yearly up to the 30th of June and the 31st of December in each year, and they did so divide the same up to the 30th of June, 1877.

On the 23d of December, 1877, J. C. died, and his widow claimed the one-fourth share of the net profits of the half-year ending on the 31st of December, 1877:

Held, first, that upon the terms of the will the person to take a share of the profits must be living at the time when it was ascertained that there were profits to be divided; secondly, that the profits in question were neither "rents, annuities, dividends, or other periodical payments," within the meaning of the Apportionment Act, 1870; and, consequently, that that act did not apply, and the widow was entitled to the whole profits of the half-year in question. *Matter of Cox's Trusts.* 1

2. A testator devised lands to William, the eldest son of the testator's nephew. The nephew had two sons, John, the elder, and William, the younger:

Held, that the devise was to William.

3. A testator made devises of gavelkind lands for lives and in tail, with remainder to his right heirs:

Held, that on failure of the particular estates the lands passed to the heir at common law, and not to the gavelkind heirs. *Garland v. Beverley.* 56

4. Where a testator by a codicil confirms his will, the will together with all previous codicils is taken to be confirmed.

5. A testatrix by her will gave shares in her residue to her nephew. By a codicil she revoked all devises and bequests to her nephew. By a second codicil she devised certain after-purchased property to the trustees of her will and confirmed her will:

Held, that the second codicil did not revoke the first, and that the after-pur-

chased property went according to the will and first codicil together, and not according to the will alone. *Green v. Tribe.* 73

6. Bequest of personality to the heirs or next of kin of A., deceased :

Held to be a gift to one class, namely, the next of kin of A., according to the statute. *Matter of Thompson.* 384

7. By settlement made in 1817 freehold and leasehold property was conveyed to trustees upon trust to apply the rents and profits in the maintenance and education of the two children of A., deceased, until the youngest of them should attain twenty-one, and from and after that event to pay the rents unto and equally between the two children of A., their heirs, executors, administrators, and assigns respectively, "provided nevertheless that in case either of the children of A. should die without leaving lawful issue," then on trust to pay the share or shares of him, her, or them so dying unto and equally between persons named.

A. had two children, one of whom, B., died intestate and unmarried, the other, C., intestate as to his share, but leaving a daughter, D. :

Held, that the interest taken by D. under the settlement was an interest in fee simple, and that an estate tail was not created by the proviso as to failure of issue. *Olivant v. Wright.* 406

8. A testatrix by her will gave all her personal and also all her real property to trustees in trust for payment of her debts and legacies, and subject thereto between her five sisters, *nominatim*, and the survivor of them, in equal shares during their lives and spinsterhood, "and upon the death or marriage of all her said sisters," she willed that "her said property should be divided in equal proportions between her brothers and sisters then living or their heirs."

The testatrix had six brothers and six sisters. Of these, one brother died before the testatrix was born, one sister died in the lifetime of the testatrix, but before the date of the will; two brothers and one sister died in her lifetime and after the date of the will, and the rest survived her, the last survivor of them being a sister :

Held, first, that the word "or" in the gift in remainder could not be read "and," and therefore that there was no intestacy :

Secondly, that as to the personal estate comprised in the gift, the word "heirs" must be construed statutory next of kin (which would include widows), and as to the real estate, heirs-at-law :

Thirdly, that such heirs-at-law and statutory next of kin of the brothers and sisters of the testatrix were to be respectively ascertained, as to the brothers and sisters who predeceased the testatrix, at the death of the testatrix, and as to those who survived her, at their respective deaths :

Fourthly, that the heir-at-law and next of kin of the brother who died before the testatrix was born were not entitled to share : and,

Fifthly, that the heir-at-law and next of kin of the sister who died before the date of the will, as well as the heir-at-law and next of kin of the two brothers and sister who died in the lifetime of the testatrix and after the date of the will, were so entitled. *Wingfield v. Wingfield.* 416

9. J. O., who died in 1860, by will made in 1859 gave to trustees all his estates of which he should be seised or possessed at the time of his decease, upon trusts as to the residue of his personal estate to convert into money, pay debts (except such mortgage debt as should be charged on the leasehold estate at C. [occupied as a farm] bequeathed to his son), invest and pay the income, and the rents of the estates to his wife for life or widowhood, she maintaining his children, provided that if his son should attain the age of twenty-one before he should become entitled in possession to the estate at C., he should be paid by the trustees, as his share of the income, £40 annually from his majority to the death or marriage of his wife, and after either event they were to assign his leasehold property at C. (charged with the payment of mortgage debts charged thereon, and also with an annuity of £9 charged thereon) unto his son. The wife was to be allowed to occupy the farm at C. until her death or marriage, for the benefit of herself and children. J. O. was, at the date of his will, possessed of two

leaseholds at C., one charged with an annuity and the other with a mortgage debt, and he was the owner of real estate at B. In October, 1859, he purchased another leasehold adjoining his leaseholds at C., and in November, 1859, he sold his estate at B. and received the purchase-money, but died suddenly before the completion of the purchase of the leasehold at C.

The son attained the age of twenty-one and died before his mother :

Held, that the legal personal representative of the son was entitled to be paid £40 a year until the death of the testator's widow or marriage; and that the after-acquired leasehold at C., there being no contrary intention shown, within the meaning of the Wills Act (1 Vict. c. 26), s. 24, formed part of the leaseholds at C. which the testator possessed at his death, and which he specifically bequeathed to the son. *Matter of Ord.* 424, 430 note.

10. As a general rule, a bequest of "household furniture" will not pass the tenant's fixtures in a leasehold house occupied by the testator. *Finny v. Grice.* 460, 462 note.

11. Bequest of "the sum of £100 to each of the children of my niece M. who shall live to attain the age of twenty-one years."

The niece survived the testatrix, and was still living, but had not yet had any children :

Held,—applying the rule that, under a gift of a certain sum to each of a class of objects at a future period, objects born after the testator's death cannot be admitted, — that no child the niece might have could take under the bequest. *Rogers v. Mutch.* 473

12. Bequest of personal estate to "the children of A. during their lives, and on the decease of either of them, his or her share of the principal to go to his or her lawful heir or heirs" :

Held, that "lawful heir or heirs" must be read literally, and not as meaning "next of kin," "executors or administrators," or "children." *Smith v. Butcher.* 558

13. A testatrix gave a sum of stock to trustees to pay the dividends to her

brother Charles and his wife Elizabeth for their lives, and after the decease of the survivor, the capital to be divided between all the children of her brother. The brother had three children by his first wife, two children by his second wife Elizabeth before marriage, and one child after marriage, which were facts well known to the testatrix, who promised, as the claim alleged, that if he married his wife Elizabeth she would provide for all his children by her, and she in fact treated all the children equally as her nephews and nieces, and it was further alleged that the testatrix gave instructions that her will should be so drawn as to provide equally for both classes of children, and that she believed such to be the effect of the words of the will :

Held, upon demurrer, that the illegitimate children must be excluded from the bequest; and that the words of the will being distinct, no extrinsic evidence could be received to show what the intention of the testatrix was. *Ellis v. Houston.* 653, 664 note.

14. Testator gave his real and personal property upon trust for the children of his daughters who should live to attain twenty-five. At his death one of his daughters had a child who had attained twenty-five :

Held, that this gift was not void for remoteness, but was a valid gift to such of the children living at the testator's death as should attain twenty-five. *Picken v. Matthews.* 681

15. A testator whose assets consisted partly of personal estate in the colony of Victoria where duty is payable on the property of all deceased persons, died domiciled in England, and by his will gave many pecuniary legacies, and divided the residue among some of the pecuniary legatees :

Held, that the duties attaching in Victoria, and all expenses of realization were payable out of the general estate before distribution, and that the pecuniary legatees were entitled to their legacies free of all colonial duties and expenses except the English legacy duty. *Peter v. Stirling.* 691, 696 note.

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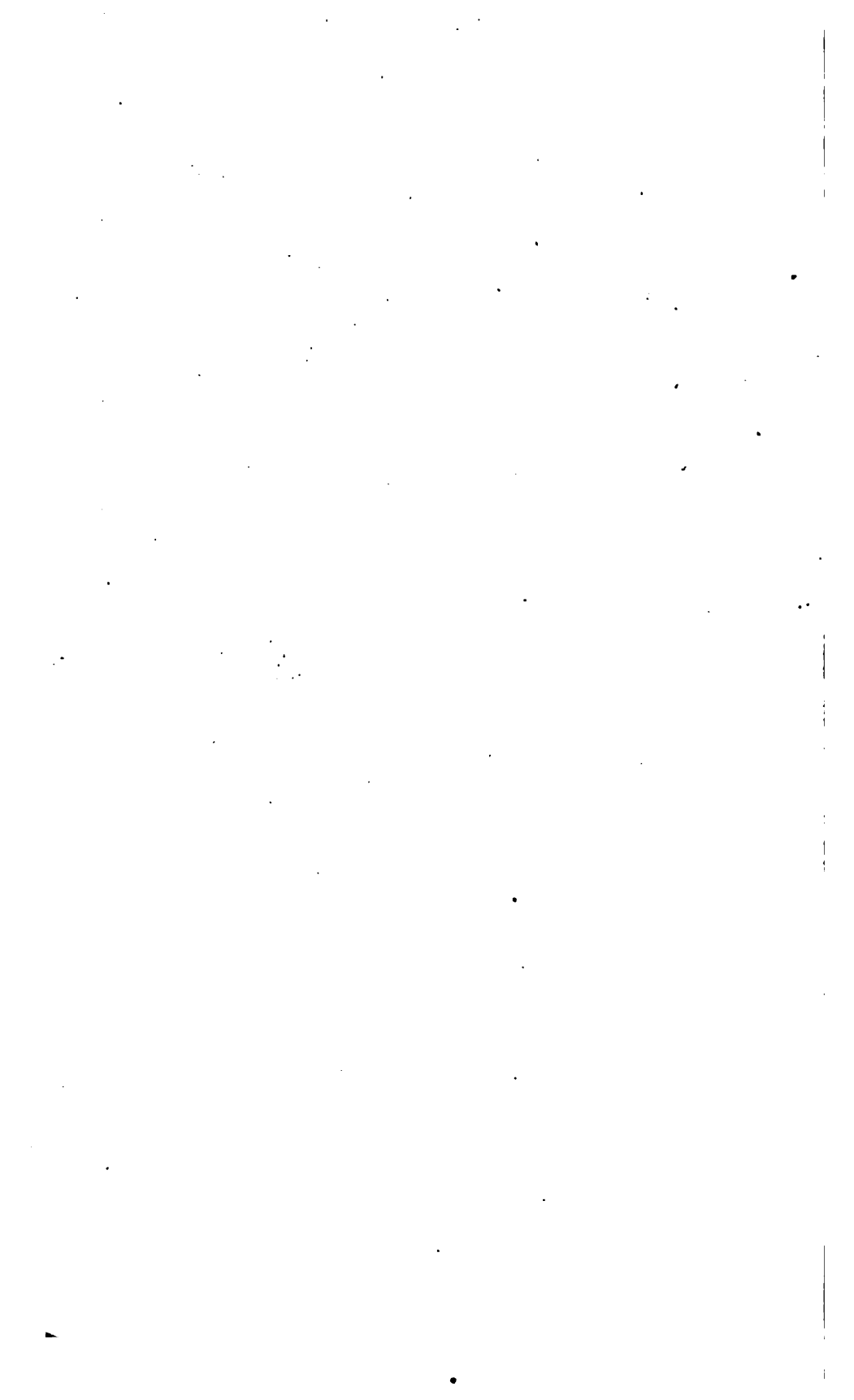
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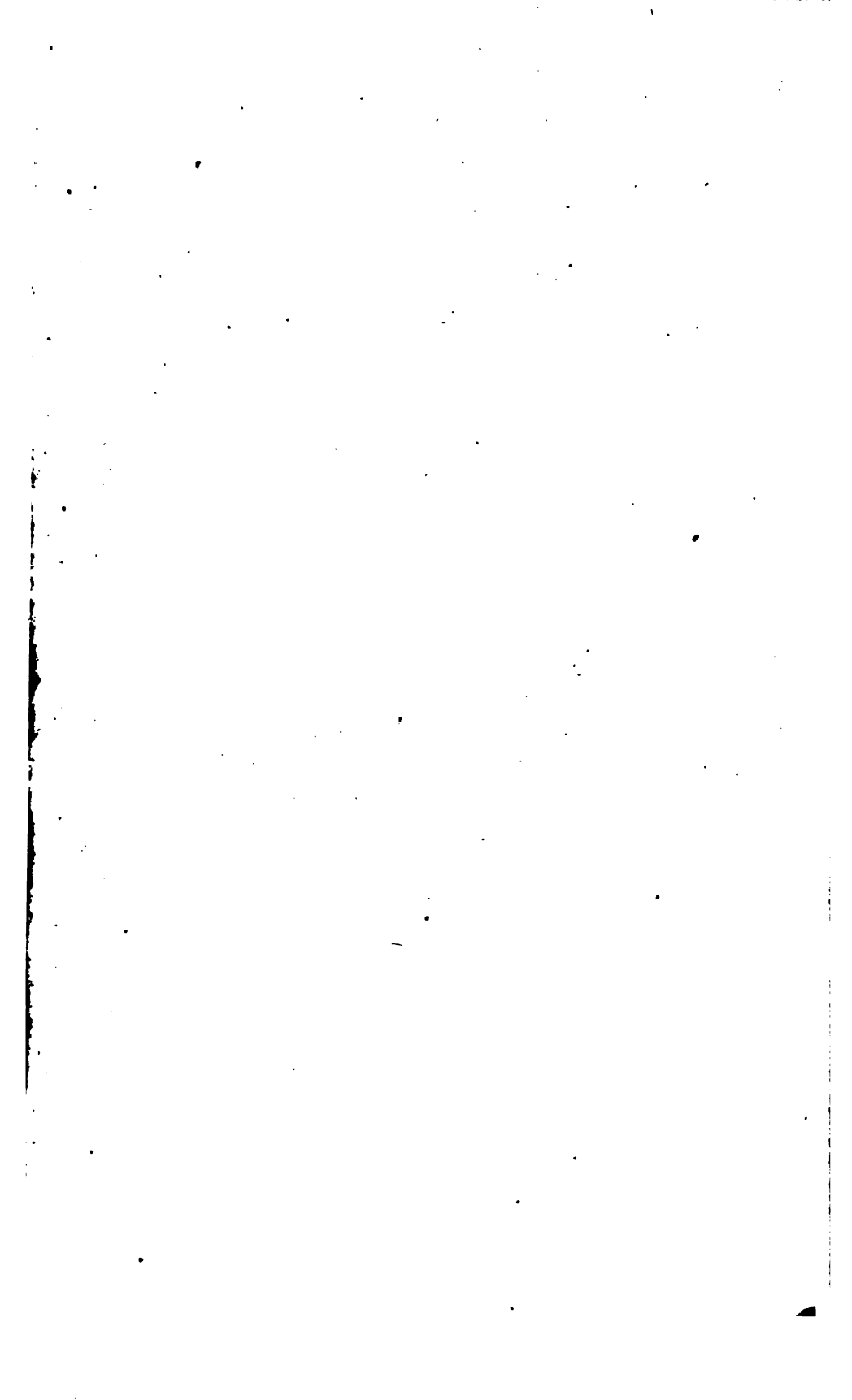
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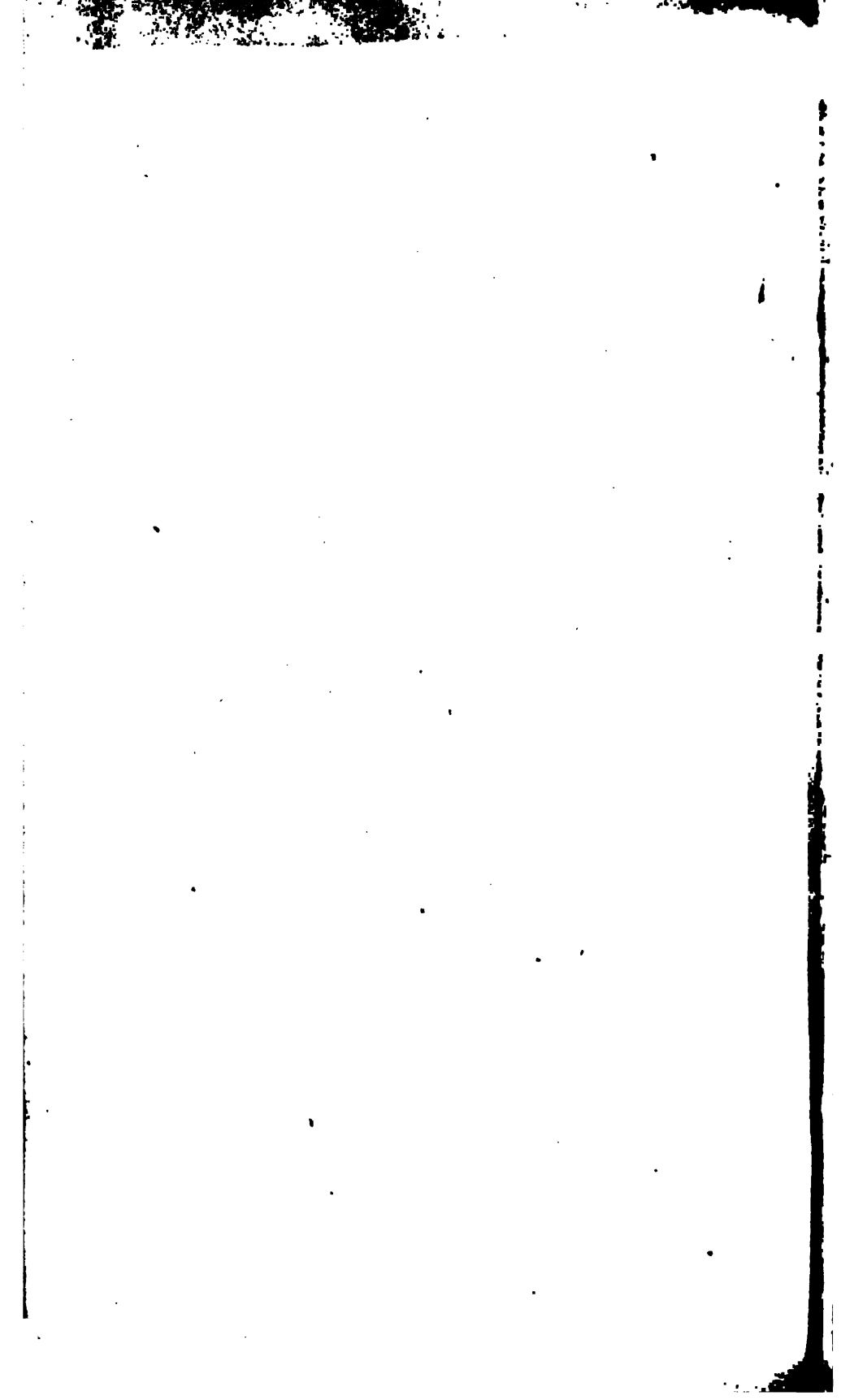
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